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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 805

RICHARD A. WOODRING,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

SCHOFIELD, HANSON, BRIDGETT,
MARCUS & JENKINS,
ARTHUR T. BRIDGETT,
JOHN J. VLAHOS,
593 Market Street, San Francisco 5, California.
Attorneys for Petitioner.

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No.

RICHARD A. WOODRING,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner Richard A. Woodring prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Richard A. Woodring v. United States of America* (Case No. 19,184) entered on September 16, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals in the instant case is reported in *Woodring v. United States* (9th Cir. 1964) 337 F.2d 235 (Advance Sheet No. 1), and is set forth as Item Number 1 of Appendix B herein. The opinion of the United States Court of Appeals on the first appeal of this matter is reported in *Woodring v. United States* (9th Cir. 1962) 304 F.2d 308, and is set forth as Item Number 2 of Appendix B herein.

The memorandum opinions of the United States District Court for the District of Alaska (Case No. F-8-63 Cr.), dated September 5, 1963 (Vol. I, Transcript of Record, pages 18-26) and November 26, 1963 (Vol. I, Transcript of Record, pages 71-85* **), are set forth as Items Number 3 and 4 respectively, of Appendix B herein. These opinions were rendered in the second trial of the case, from a judgment of conviction in which the appeal to the Court of Appeals was taken in the instant Ninth Circuit case Number 19,184.

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*Hereinafter, references to the volume and page of the Transcript of Record will be as follows: T-I 71-85.

**The record in this case consists of five separate volumes. Volume I contains the file of the District Court and the proceedings before the Court of Appeals and is paginated pages 1-111. Volume II consists of proceedings on the motion to dismiss the indictment and on the arraignment and is paginated pages 1-52. Volumes III, IV and V contain the trial proceedings, and these volumes are consecutively paginated pages 1-667.

JURISDICTION

Jurisdiction of This Court

The judgment of the Court of Appeals in case Number 19,184 was made and entered on September 16, 1964.

The order of the Court of Appeals denying petitioner's petition for a rehearing was made and entered on November 4, 1964.

Petitioner's application for extension of time within which to file this Petition for Writ of Certiorari was granted by order of the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, dated November 27, 1964, granting petitioner to and including January 2, 1964, within which to file this Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254, subdivision 1.

Jurisdiction of the Court of Appeals

Jurisdiction of the Court of Appeals for the Ninth Circuit was based on Title 28, United States Code, Sections 1291, as amended, and 1294, subdivision 1, as amended.

Jurisdiction of the District Court

Petitioner was indicted by a grand jury empaneled by the United States District Court for the District of Alaska on February 15, 1963, which indictment charged violations of Title 18, United States Code, Sections 2113(a), 2113(d) and 2314. Petitioner appealed to the Court of Appeals from the District

Court's judgment of conviction on a violation of Title 18, United States Code, Section 2113(a). Jurisdiction in the District Court was claimed under Title 18, United States Code, Section 3231.

QUESTIONS PRESENTED

I. The Court below erred in failing and refusing to determine whether the District Court for the District of Alaska was in existence on January 12, 1959, the date of the alleged crime; the District Court had no jurisdiction to try petitioner under the circumstances of the case, viewed in the light of the provisions of the Alaska Statehood Act.

II. The District Court erred in refusing to instruct, in a circumstantial evidence case, on "exclusion of every reasonable hypothesis but that of guilt", when considered in connection with the instructions given on reasonable doubt.

III. The District Court erred in commenting to the jury and instructing the jury on the subject of petitioner's first trial and conviction.

STATUTES, PROCLAMATIONS AND EXECUTIVE ORDERS INVOLVED

This case involves, *inter alia,* a consideration of the meaning and effect of the following:

Alaska Statehood Act, Public Law 85-508, July 7, 1958, sections 12-18; 72 Stat. 339, 348-50, sections 12-18 (set forth as Item No. 1 of Appendix A herein);

Proclamation No. 3269, January 3, 1959; 24 Fed. Reg. 81; 1959 U.S. Code Cong. & Ad. News 939 (set forth as Item No. 2 of Appendix A herein);

Executive Order No. 10867, February 20, 1960; 25 Fed.Reg. 1584; 1960 U.S. Code Cong. & Ad. News 1661-62 (set forth as Item No. 3 of Appendix A herein).

STATEMENT OF THE CASE

1. Proceedings Below

This case involves two trials and two appeals. Although this petition is directed to the opinion and judgment of the Ninth Circuit in the second appeal, it will be necessary to set forth the proceedings chronologically in order to set the case in its proper context.

The bank robbery out of which this case arose occurred on January 12, 1959 (T-I 1-2), nine days after the promulgation of the Presidential Proclamation admitting Alaska to statehood on January 3, 1959. (Proclamation No. 3269, January 3, 1959, 24 Fed.Reg. 81; Appendix A, *infra,* Item 2.)

On March 11, 1959, a grand jury, empanelled not by the District Court for the District of Alaska but rather by the old District Court for the Territory of Alaska, which continued on an "interim" basis under section 18 of the Alaska Statehood Act, Public Law 85-508, July 7, 1958, 72 Stat. 739, 750 (Appendix A, *infra,* Item 1), returned an indictment to the interim court against petitioner charging him with violations

of sections 2113(a)—bank robbery, 2113(d)—bank robbery with assault and the putting of life in jeopardy by use of a dangerous weapon, and 2314—interstate transportation of stolen money in the amount of $5,000.00 or more, of Title 18 of the United States Code. (T-I 7-8.)

However, petitioner was not tried in the interim court, but rather in the United States District Court, presumably pursuant to an order of transfer made by the interim court[1] in anticipation of the President's Executive Order which terminated the existence of the interim court on February 20, 1960. (Executive Order No. 10867, February 20, 1960, 25 Fed. Reg. 81; Appendix A, Item 3.)

After a judgment of conviction on two counts,[2] the Court of Appeals for the Ninth Circuit reversed on the grounds that the Alaska Statehood Act did not provide for transfer from the interim court to the District Court of cases not *pending* in the interim court as of the date of admission to statehood but rather which arose after the date of statehood. *Woodring v. United States* (9th Cir. 1962) 304 F.2d 308; Appendix B, Item 2.[3]

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[1]The interim court's order of transfer, dated February 19, 1960, is set forth in *Woodring v. United States* (9th Cir. 1962) 304 F.2d 308, at 309, n. 5; Appendix B, *infra*, Item 2.

[2]The jury rendered guilty verdicts on all three counts; however, the court granted petitioner's motion for judgment of acquittal after trial as to the second count, the aggravated bank robbery in violation of 18 U.S.C. § 2113(d) (T-I 11).

[3]Hereinafter, the opinion in the first appeal will be referred to as "*Woodring*—(first appeal)" or "the first appeal".

Petitioner was reindicted on the same charges on February 15, 1963, this time by a grand jury empanelled by the United States District Court. (T-I 1-2.) Throughout these proceedings, petitioner attacked the jurisdiction of the District Court.[4]

After trial, the jury returned a verdict of guilty on Count I (bank robbery in violation of 18 U.S.C. § 2113[a]) (T-I 68), and petitioner was sentenced to a term of fifteen years imprisonment. (T-I 86.)[5] The judgment of conviction was affirmed on the second appeal, 337 F.2d 235 (Advance Sheet No. 1); Appendix B herein, Item 1. This petition is directed to the judgment of the Court of Appeals in the second appeal.

2. Facts

The evidence at both trials was entirely circumstantial, and the Court of Appeals has twice felt com-

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[4]See Motion to Dismiss Indictment (T-I 3-13; argument set forth at T-II 2-48) and the District Court's memorandum opinion thereon (T-I 18, particularly at 21-26; Appendix B herein, Item 3); Motion and Objection to Introduction of Evidence (T-III 24-24d, T-V 590); Motion for Judgment of Acquittal at close of prosecution's case (T-V 502-516, 523); Motion for Judgment of Acquittal at close of all the evidence (T-V 556-60, 590); and Motion in Arrest of Judgment (T-I 70) and the District Court's opinion thereon (T-I 80-85; Appendix B herein, Item 4).

[5]The District Court granted the prosecution's motion to dismiss Count II of the Indictment (the aggravated bank robbery charge under 18 U.S.C. § 2113[d]) before trial (T-I 14, 15, 16). The jury returned a guilty verdict (T-I 69) on Count III of the indictment (the interstate transportation of stolen money charge under 18 U.S.C. § 2314), but on motion of petitioner (T-I 70), the District Court granted a judgment of acquittal as to that count after trial (T-I 72-73, 86; Appendix B herein, Item 4; T-II 2).

pelled to comment on the slimness of the evidence of guilt.[6]

Petitioner will briefly review the evidence adduced at the trial, because the weakness and circumstantial nature of the evidence of guilt is relevant to the consideration of the second and third questions presented in this petition. (For the purposes of brevity and clarity, certain matters in the record will be reviewed in the argument under questions two and three, respectively, because of their peculiar relevance to the points there made.)

On January 12, 1959, at approximately 4:00 to 4:10 p.m. (T-III 27, 64, 86) the Alaska National Bank of Fairbanks was robbed of $14,014.00 (T-III 128), by a single robber. (T-III 27.) The weather at the time was dark and foggy. (T-III 35.) The only persons present at the bank were four tellers (T-III 29-30), all of whom testified at the trial. Two of the four tellers estimated the time elapsed during the commission of the crime was from one to two minutes, or not more than three or four minutes. (T-III 71, 80.) F.B.I. agents reenacted the crime and calculated that commission of the robbery took from 45 seconds to one minute. (T-III 150.)

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[6]In the second appeal, the Court, in deciding the evidence of guilt was sufficient, still felt obligated to say: ". . . the jury might have found the defendant not guilty (and still have been true to its oath) . . . ." 337 F.2d 235, at 237; Appendix B herein, Item 1. In the first appeal, the Court did not reach the question of sufficiency of the evidence, but nevertheless commented: "The direct evidence was weak of Woodring's guilt, but there was probably enough circumstantial evidence to support the jury verdict." 304 F.2d 308, at 308; Appendix B herein, Item 2.

None of the bank tellers identified petitioner either before or at the trial as the robber, nor did any of them even state that petitioner, who was present in court, resembled the robber. Although the crime took a very short time to accomplish, and the robber wore a scarf over his face, right beneath his eyes (T-III 30, 106, 67) and a pile cap with flaps hanging down the side of his face (T-III 29-30, 72, 87, 89), pulled low over his forehead (T-III 106) so that only his eyes and eyebrows were visible (T-III 67), the tellers gave remarkably detailed descriptions of his physical appearance (T-III 39, 66, 87), although the descriptions varied somewhat.

Maxine Edwards, the teller who actually handed the robber the money and who was the only one to confront him face to face, stated he was a man of medium to heavy build, weighing about 200 pounds, approximately six feet tall, between 35-45 years of age, with medium to bushy eyebrows and a "kind of ruddy complexion." (T-III 39.)

An F.B.I. agent testified that in an "interview" subsequent to the commission of the crime, petitioner stated he was born on May 30, 1922, he was six feet, two inches tall, weighed 205 pounds, had brown hair, a ruddy dark complexion, and brown eyes. (T-IV 366.) This was all the evidence tending to establish petitioner's identity as the robber by physical description. The District Court, incidentally, refused to allow testimony by a witness that he had overheard Maxine Edwards tell petitioner at the time of the first trial that she did not believe petitioner was the

robber. (T-IV 349-50.) The Court of Appeals summarily rejected a claim that refusal to allow this testimony was error. *Woodring v. United States* (second appeal), *supra,* 337 F.2d 235, 236.

Maxine Edwards testified that the robber's scarf was plain, that his pile cap was beige or brown, although she was not sure of the color, that he wore gloves, a heavy, bulky parka similar to the type worn by service men in the Fairbanks area, with its hood back, carried a brown paper shopping bag with cord handles, similar to the type used in grocery stores, and displayed a short, black revolver. (T-III 29-30, 46.) The other tellers gave similar descriptions, although there were discrepancies. One described the scarf as being yellow plaid, while another stated it was brown wool plaid. (T-III 87, 67.) One stated the gloves were grey wool, looking like a glove "liner", another described them merely as grey wool, while the others couldn't recall the gloves. (T-III 87, 90-91, 67, 48, 106.)

On January 23, 1963, petitioner's wife gave a hat (Exhibit A) to an F.B.I. agent who was investigating the crime at her apartment. (T-IV 299-301.) No one testified this hat belonged to petitioner. There was also introduced into evidence a parka, scarf and revolver which petitioner had left in a parachute bag at the home of one Red Boucher on the day of the crime (T-III 204, T-IV 293), and gloves recovered from among petitioner's personal effects when he was interviewed and then arrested in Tulsa, Oklahoma. (T-IV 376, 379, 380.)

These items were shown to the bank tellers at the trial, and they generally testified that the exhibits were similar or appeared to be similar to the articles worn or carried by the robber. (See generally, T-III 45-48, 72-74, 83, 89-92, 107, 113.) Even though the testimony was that the hood of the parka was down, none of the tellers had mentioned in their description the bright red lining on the inside of the hood of the parka in evidence as an exhibit. As a matter of fact, there was testimony that the parka worn by the robber was the same kind worn by all the military personnel in the area at the time. (T-III 73.) There were also discrepancies between the description of the scarf and the scarf in evidence. (See T-III 87, 90, 100.)

The key evidence used to convict petitioner was a large amount of money found in his possession in Tulsa, Oklahoma, not quite a month after the crime. Woodring apparently learned that F.B.I. agents were seeking him in Tulsa in connection with the Alaska bank robbery and on January 22, 1959, *he arranged a meeting for the next day.* (T-IV 360, 368-9). Instead, two F.B.I. agents showed up at 9:30 p.m. on January 22 at the home of petitioner's brother-in-law, where petitioner was staying, took him to the local F.B.I. office and conducted a three hour and forty-five minute "interview", terminating at 1:45 a.m., during which a long statement was taken from petitioner. (T-IV 353-54, 356-65.) In this statement, petitioner fully described his whereabouts on the day in question, and it was from these leads that the

prosecution's case tending to establish the opportunity to commit the crime was based. He admitted buying a 1957 Volkswagen in Los Angeles sometime between January 13 and January 21, and paying $1,550.00 therefor. (T-IV 361.) He told F.B.I. agents that when he left Alaska he had $2,600.00 or $2,700.00 which he had saved, and that his finances as of the time of the interview were the sum of $14.00 (T-IV 364.)

After several searches of the brother-in-law's premises (see T-IV 367, 375, 383), the brother-in-law took F.B.I. agents to the garage, where a shoe-box was found on a shelf, containing $3,221.00. (T-IV 383.) According to the F.B.I. agents petitioner first said he didn't know if the money was his (T-IV 384), later said he thought the money might be his property, but refused to divulge the source, saying he would do so later. (T-IV 389-90.) At an earlier search, petitioner brought a brief case into the living room in which was found two packets of money, 25 ten dollar bills in each, with the picture on each bill facing up, and a paper clip on the left hand corner. (T-IV 378-80.) Petitioner recalled that he had a habit of "stashing" money. (T-IV 379.)

All the money found in these searches was sent to the fingerprint lab in Washington. (T-IV 382, 384.) Of all the bills sent to Washington, fingerprints were found on only three. Two contained the print of one of the tellers, and one the print of a teller *who was not on duty the day of the robbery.* (T-IV 456, T-III

147.) Interestingly, none bore fingerprints of teller Maxine Edwards who handled all the money at the time of the robbery. These fingerprints were the only evidence which tended to indicate that the money found was the money stolen. In a town the size of Fairbanks, it would seem a permissible inference that many townspeople on any given date would have money bearing the fingerprints of employees of a leading bank.

The F.B.I. agents testified that when confronted with the money, petitioner became red in the face, cried, moved his arms vigorously, and said no one would believe him. (T-IV 386.)

The prosecution introduced evidence of petitioner's whereabouts on the day of the crime, to show that he had the opportunity to commit the robbery. However, this evidence was somewhat conflicting and was subject to interpretations which would place petitioner elsewhere at 4:00 to 4:10 p.m., when the crime was committed.

Red Boucher testified he saw petitioner on January 12, 1959, shortly prior to noon at Boucher's residence, and that petitioner spent a good portion of the day with him. (T-III 202.) He estimated that petitioner remained with him between three to four hours, during which time various visitors arrived, remaining there less than one-half hour. (T-III 204.) One Greiss testified that he arrived at Boucher's sometime between 2:00 and 3:00 p.m., remained there between 30 minutes to an hour, leaving to take one

Vitone to the airport to catch a 3:20 p.m. flight. (T-III 224-225.) Boucher stated that after Greiss departed, petitioner left within one-half hour to an hour, and prior to 4:00 p.m., and that petitioner returned, depositing the parachute bag, within a half hour to an hour and a half after he had left. (T-III 204.)

Thus, if Greiss arrived at 2:00 p.m., stayed for a half hour, or until 2:30, and if petitioner left a half hour later, or 3:00 p.m., and returned in a half hour with the parachute bag which contained the "incriminating" exhibits, then petitioner would have made his return and deposited the parachute bag at 3:30 p.m., *prior* to the commission of the robbery.

Likewise, another prosecution witness testified that petitioner arrived at her place of employment at 3:45 p.m. and remained for five to ten minutes. (T-III 234.) On cross-examination the witness admitted that petitioner might have arrived as late as 3:50 p.m. (T-III 236), making it unlikely that petitioner would have had time to get to the scene of the crime.

Moreover, one defense witness stated that he saw and talked to petitioner at a drug store shortly after 4:00 p.m., the conversation lasting approximately fifteen minutes. (T-V 527-29.) Another defense witness confirmed the alibi by stating that she saw the petitioner at the drug store shortly after 4:00 p.m., talking to another man. (T-V 542-44.)

Even if one were to accept the prosecution's interpretation of the timetable of petitioner's whereabouts,

the record is devoid of any evidence showing the distance from the bank of the places petitioner was supposed to have been near the crucial time.

Other prosecution evidence indicated that on the day of the robbery, petitioner paid several debts with twenty dollar bills (T-IV 252, 276), and paid cash for his airplane ticket to Seattle with twenty dollar bills. (T-III 166, 169.) It also indicated he bought a Volkswagen in Los Angeles shortly after the date of the crime, paying $1,550.00 with three groups of $20.00 bills and one $50.00 bill, the transaction taking place in a gas station rest room. (T-IV 306.)

The evidence also indicated that when petitioner arrived at his brother-in-law's home in Tulsa, he told his brother-in-law he was prosperous, paid him $200.00 for a telephone call in twenty dollar bills, and offered him the title to the Volkswagen for one dollar. (T-IV 327-28.) However, the brother-in-law conceded that several times petitioner had returned to Tulsa "flush with money." (T-IV 335.)

It can be seen from this review, that while there was some evidence tending to cast suspicion upon petitioner, evidence of guilt was by no means compelling and entirely circumstantial.

ARGUMENT

I

THE COURT BELOW ERRED IN FAILING AND REFUSING TO DETERMINE WHETHER THE DISTRICT COURT FOR THE DISTRICT OF ALASKA WAS IN EXISTENCE ON JANUARY 12, 1959, THE DATE OF THE ALLEGED CRIME; THE DISTRICT COURT HAD NO JURISDICTION TO TRY PETITIONER UNDER THE CIRCUMSTANCES OF THE CASE, VIEWED IN THE LIGHT OF THE PROVISIONS OF THE ALASKA STATEHOOD ACT:

A. Statement of the Problem:

In its opinion on the first appeal, the Court of Appeals expressly left a number of questions unresolved. Chief among these was the following (304 F.2d 308, at 310):

> "Was there a United States District Court for the District of Alaska in existence without a judge or other staff from January 3, 1959, to the date Judge Walter H. Hoge qualified on February 20, 1960, as the first Constitutional Judge for the District of Alaska?"[7]

It was unnecessary for the Court of Appeals to determine that question in the first appeal. All that was necessary to decide, as the court did, was that the Alaska Statehood Act, while providing for transfer of criminal cases *pending* in the territorial court on the date of admission to statehood to the new District

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[7]The Court of Appeals for the Ninth Circuit had earlier indicated that the question of the existence of the District Court prior to February 20, 1960, was an open one, stating, in *Parker v. McCarrey* (9th Cir. 1959) 268 F.2d 907, 908-909 (per curiam): "It is possible that the 'District Court for the District of Alaska' is in existence now and is just not staffed, or it may be that it comes into existence when the President appoints the federal district judge therefor. That is a question we do not decide." See also, *Mahlum v. Carson* (9th Cir. 1962) 304 F.2d 285, 289.

Court, did not provide for transfer of cases *not* pending as of that date.

However, the Honorable Oliver D. Hamlin, Jr., Circuit Judge, in the dissenting opinion in that case, felt that the majority opinion raised questions as to the status of cases transpiring during the interim period, stating (304 F.2d 308, 310, at 316):

> "This effect is not minimized by setting forth a series of questions at the end of the opinion which are intended to describe those things which the majority opinion does not decide. A case such as this one is not decided in a vacuum. Its result establishes a shaky foundation for future cases in our circuit. The majority opinion undoubtedly will have far reaching effect on any litigation that transpired during the interim . . . ."

The Court of Appeals was squarely faced in the second appeal with the problems forecast by its opinion in the first appeal. For on the second appeal the following set of facts was before the court:

B 1. The crime occurred on January 12, 1959,

a. after passage of the Alaska Statehood Act (Public Law 85-508, 72 Stat. 339, 348-50) on July 7, 1958;

b. while the interim court was still functioning, no judge, marshal, or officers having been appointed for the new District Court;

c. prior to the Executive Order of February 20, 1960 (25 Fed. Reg. 1584) terminating the existence of the interim court, declaring the appointment of a judge, marshal and other court

officers for the new United States District Court, and declaring that the District Court was now prepared to assume its functions.

2. Petitioner was indicted, tried and convicted in the new United States District Court, *after* enactment of the Alaska Statehood Act, termination of interim court, and the appointment of a judge, other officers for, and the assumption of functions by, the new District Court.

But on the second appeal, the court below remained steadfast. ". . . [W]e need not *yet* decide whether the United States District Court for the District of Alaska was created with statehood on January 3, 1959, or when it was organized later." (337 F.2d 235, at 236; emphasis added.)

Petitioner urges this Honorable Court that the concept of procedural due process dictates that his conviction cannot be affirmed without a determination as to whether the District Court was in existence on January 12, 1959, and hence whether it had jurisdiction. "Yet" is and must be, "now".

B. Necessity of Determination:

Determination of the question of the existence of the United States District Court on the date of the commission of the crime is one of vital public importance. Its resolution is necessary not only to determine whether petitioner may constitutionally be deprived of his liberty,[8] but also to resolve the now

[8]Petitioner has at all times since his arrest in January, 1959, been free on bail.

questionable propriety of the incarceration of others who were tried, convicted and imprisoned by the United States District Court for the District of Alaska subsequent to February 20, 1960, for crimes committed in the interim period between January 3, 1959, and February 20, 1960.[9] No appellate case has answered this vital question, which is of pressing public concern.[10]

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[9]The urgency of timely preparation and filing of this Petition precluded petitioner from compiling statistics showing the number of others similarly situated. This court, however, may take judicial notice of the fact that their number is not small. The government itself expressed concern as to the status of such persons in its petition for rehearing to the Court of Appeals in the first appeal. "Presumably, this Court can judicially notice that their opinion, as it now stands, will affect many persons. The majority opinion calls attention to this fact in suggesting at least four jurisdictional questions. In any event, this decision serves to create a remarkable problem for Alaska State litigants of the January 3, 1959 to February 20, 1960 era." (Petition for Rehearing by Appellee United States of America, United States Court of Appeals for the Ninth Circuit, No. 17094, page 3.) The Court of Appeals for the Ninth Circuit has itself judicially noticed the public concern as to the jurisdiction of courts during the interim period. *Mahlum v. Carson, supra,* n. 7, 304 F.2d 285, at 286.

[10]In addition to the two Woodring appeals, and *Parker v. McCarrey* and *Mahlum v. Carson,* both *supra,* n. 7, the following cases have considered the "judicial sections" of the Alaska Statehood Act: *Metlakatla Indian Community v. Egan* (1960) 363 U.S. 555, 80 S.Ct. 1321, 4 L.Ed.2d 1397; *Spaulding v. Taylor* (10th Cir. 1964) 336 F.2d 192 (Advance Sheet No. 2); *Arctic Maid v. Territory of Alaska* (9th Cir. 1961) 297 F.2d 28 (per curiam); *Underwriters at Lloyd's of London v. Cordova Airlines Inc.* (9th Cir. 1960) 283 F.2d 659; *Jackson v. United States* (9th Cir. 1959) 270 F.2d 384; *Deere v. United States* (9th Cir. 1959) 268 F.2d 912; *Selid Constr. Co. v. Guarantee Ins. Co.* (9th Cir. 1959) 268 F.2d 913; *Kosters v. United States* (9th Cir. 1959) 268 F.2d 913; *Emberg v. McCarrey* (9th Cir. 1959) 268 F.2d 913 *(Deere, Selid, Kosters* and *Emberg* were all short memorandum opinions following *Parker v. McCarrey, supra* n. 7); *United States v. Starling* (D.C.Territ. Alaska 1959) 171 F.Supp. 47; *Hobbs v. State* (Alaska 1961) 359 P.2d 956.

C. The District Court Was Not in Existence on January 12, 1959:

In enacting the "judicial sections" of the Alaska Statehood Act (Public Law 85-508, 72 Stat. 339, 348-50, 12-18; Appendix A, *infra,* Item 1), Congress, in cooperation with the prospective new state of Alaska, attempted "to accomplish the joint purpose of avoiding and interregnum of judicial administration in the interim period." *Metlakatla Indian Community v. Egan* (1960) 363 U.S. 555, 558, 80 S.Ct. 1321, 4 L.Ed. 2d 1397.

The statutory plan for accomplishing this purpose was as follows: By section 12, various provisions of Titles 18 and 28 of the United States Code were amended or repealed, in general deleting references to the "District Court for the Territory of Alaska", and to the "Territory of Alaska", and adding "Alaska" where relevant. Section 12 also added a new section to Title 28, section 81A, which reads:

> "Alaska constitutes one judicial district. Court shall be held at Anchorage, Fairbanks, Juneau, and Nome."

Then the Alaska Statehood Act provides for the saving and non-abatement of actions pending as of the date of admission to statehood, and for the prosecution of causes accruing prior to such date but not then pending (section 13), the disposition of appeals pending or potentially pending as of such date (section 14), the transfer of cases pending in the United

States District Court for the Territory of Alaska[11] to the appropriate new courts, either the new United States District Court or the new state courts, the procedure on appeals of cases so transferred to the new District Court (section 15), and the succession of jurisdiction of cases pending in the territorial court as of the date of admission to statehood to either the state courts or to the new District Court (sections 16 and 17).

Having by these sections established the above described pattern, which would otherwise have become effective upon the admission of Alaska to statehood, Congress in section 18 then suspended the effectuation of these sections (see *United States v. Starling* [D.C. Territ. Alaska 1959] 171 F. Supp. 47, 59) until either three years after the effective date of the Act (i.e., admission to statehood) or until "the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it."

Section 18 further provided that until the expiration of the three years or the sooner issuance of the

[11]Hereinafter, for purposes of convenience, the United States District Court for the Territory of Alaska as it existed prior to Alaska's admission to statehood shall be referred to as the "territorial court"; the United States District Court for the Territory of Alaska as it was continued after statehood by virtue of section 18 of the Alaska Statehood Act shall be referred to as the "interim court"; and the United States District Court for the District of Alaska shall be referred to as the "District Court".

President's Executive Order, "the United States District Court for the Territory of Alaska shall continue to function as heretofore." The Executive Order, as mentioned above, was issued on February 20, 1960. (Executive Order No. 10867, 25 Fed. Reg. 1584; Appendix A, *infra,* Item 3.)

By this scheme, Congress created a new "animal", the interim court, to prevent an interregnum in the transitional period, for the old territorial court could not exist after the admission of the Territory of Alaska to statehood. See *Benner v. Potter* (1850) 50 U.S. (9 How.) 235, 13 L.Ed. 119.

The exact status of the interim court has never been determined. See *Matlakatla Indian Community v. Egan, supra,* 363 U.S. 555, 558, 80 S.Ct. 1321, 4 L.Ed. 2d 1397; *Woodring v. United States* (second appeal), *supra,* 337 F.2d 235, 236; *Woodring v. United States* (first appeal), *supra,* 304 F.2d 308, 310; *Parker v. McCarrey, supra,* 268 F.2d 907, 909. It was not the United States District Court for the District of Alaska. *Parker v. McCarrey, idem.* Yet it apparently had jurisdiction to try persons accused of offenses against the laws of the United States committed prior to statehood. See *United States v. Starling, supra,* 171 F.Supp. 47, 66. *But cf., Metlakatla Indian Community v. Egan, supra,* 363 U.S. 555, 558, 80 S. Ct. 1321, 4 L.Ed. 2d 1397, and *Mahlum v. Carlson* (9th Cir. 1962) 304 F.2d 285, 289. It would seem that it also had jurisdiction over federal crimes committed during the interim period. *Cf., Woodring v. United States* (first appeal), *supra,* 304 F.2d 308, 310, 312

n. 3 (dissent) and *United States v. Starling* (*idem*). And it had jurisdiction to try non-federal criminal offenses, at least if committed prior to statehood. *Hobbs v. State* (Alaska 1961) 359 P. 2d 956.

Petitioner submits that, whatever the status of the interim court was, the District Court did not come into existence until a judge, marshal and court officers were appointed for it, and it was ready to assume its functions, as declared by the Executive Order of February 20, 1960. To hold otherwise is to ignore the clear meaning and import of section 18 of the Alaska Statehood Act.

Sections 12 through 17 of that Act, when read together, purport to create the new District Court. But Congress, in section 18, suspended the effectiveness of those sections until either of the conditions specified in that section were fulfilled—the expiration of three years or the earlier issuance of the Presidential Executive Order. Until either of these conditions was fulfilled, the District Court did not exist. Recognizing that fact, Congress provided that the old territorial court should continue, as an interim court, to assume and continue its old jurisdiction until such time that the state courts and the new District Court were organized and were able to assume judicial functions.

The mere fact that sections 12 through 17 by their terms arguably purport to create a District Court does not mean that such a court was in existence on January 12, 1959, the date of the crime. Those sections must be read in the light of section 18.

The entire Alaska Statehood Act, including the "judicial sections", was enacted on July 7, 1958. Yet no one would contend that any of its provisions were then effective, for its effectiveness was conditioned upon admission of Alaska to statehood. Until that time, the entire Act and all its provisions remained in abeyance; its provisions were mere words, a plan as it were, which created nothing and through which nothing was or could be executed until this first condition was met.

Even after the first condition was fulfilled by the Presidential Proclamation of January 3, 1959 (Proclamation No. 3269, 24 Fed. Reg. 81; Appendix A, *infra,* Item 2), the effectiveness of the judicial provisions encompassed in sections 12 through 17 was further conditioned by the terms of section 18. Until these conditions occurred sections 12 through 17 were likewise mere words, a plan, creating nothing.

This view of the non-existence of the District Court at the crucial time is fortified by the statutory language creating District Courts, contained in Title 28 of the United States Code.

Sections 81 through 131 of Title 28 divide the various states, the District of Columbia and Puerto Rico into judicial districts. As mentioned, section 12 of the Alaska Statehood Act added a section, 81A, constituting Alaska as one judicial district. But sections 81 through 131 do not in and of themselves create District *Courts.* Section 133 of Title 28, United States Code, provides that "The President shall appoint, by and with the advice and consent of the Senate, dis-

trict judges for the several judicial districts. . . ." And section 132 of Title 28, dealing with the creation of district courts, significantly provides:

> "(a) There shall be in each judicial district a court which shall be a court of record known as the United States District Court for the district.
>
> "(b) Each district court *shall* consist of the district judge or judges for the district. . . ." (Emphasis added.)

This is a clear and explicit statutory recognition of the fact that until a judge is appointed in the district, the district court therein does not exist. This is not to say that when a district court comes into existence with the appointment of a judge, *subsequent* vacancies in the judgeship terminate the *already created* court. That would be an absurd result, and it is specifically provided in 28 U.S.C. 143, 28 U.S.C.A. 143, that "[W]hen the office of a district judge becomes vacant, all pending process, pleadings and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court."

The fact that Congress has felt it necessary to specifically provide for continuance of the jurisdiction of the district court when the office of district judge becomes vacant, indicates that Congess felt occupancy of the office was essential to the existence of the court, unless otherwise provided, as section 143 is not by its language applicable to situations where no judge has ever been appointed. The section is prospective, and assumes that the court has been already

created by the initial appointment of a judge for it speaks of an "office" which "*becomes* vacant." (Emphasis added.) It must be recalled that in the instant case, the clerk referred to in section 143 was likewise not appointed until February 20, 1960.

Thus petitioner submits that his point is still valid, even if it be held that section 18 of the Alaska Statehood Act suspended the effectiveness of sections 13 through 17 of that Act, but not section 12, which latter section adds 28 U.S.C. 81A, 28 U.S.C.A. 81A, creating the new District of Alaska. For even if the new District were held to have been created immediately upon admission to statehood, no court therefor would have come into existence until the appointment of a judge. That took place on February 20, 1960.

This interpretation is the only one consistent with reality and logic. It would be an absurdity to maintain that a court exists when no judicial officer has been appointed therefor, when no clerks, marshals and other attaches have been appointed, when no machinery has been set up, in short, when it is unable to carry out judicial *functions*. A court is the functional arm of a living process of judicial administration. A "court" which cannot function is one in name only, and not a court in the real sense at all.

This Court has clearly taken this view. In *Metlakatla Indian Community v. Egan, supra*, 363 U.S. 555, 80 S.Ct. 1321, 4 L.Ed. 2d 1397, this Court was faced with the question as to whether the interim court was the "highest court of . . . [the State of

Alaska] in which a decision could be had," so that jurisdiction over an appeal from interim court could be had under 28 U.S.C. 1257(2).

The notice of appeal from the judgment of the interim court was filed on August 6, 1959. At the time of such filing, no new Alaska State court was in actual operation, although the justices of the state supreme court *had actually been appointed* previously, on July 29, 1959. See 363 U.S. 555, at 559.

The Alaska Constitution, like the Alaska Statehood Act, provided that it took effect "immediately upon the admission of Alaska into the Union as a State" (Art. XV, § 25), and provided for a supreme court to be the highest court of the state, with final appellate jurisdiction (Art. IV, §§ 1, 2). Section 17 of Article XV, like section 18 of the Alaska Statehood Act, provided that in the interim period, until the new state courts were organized, "the judicial system shall remain as constituted on the date of admission . . ." and that "[w]hen the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law." See 363 U.S. 555, at 559.

This Court determined that the interim court was a state court. In deciding the question as to whether

the interim court was also the highest court of the State of Alaska, this Court was faced with the facts stated above and certain Alaska legislation. Alaska Laws 1959, c. 151, § 1, amending Alaska Laws 1959, c. 50, § 32, provided that in the event that "a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the . . . [interim court], the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the . . .[interim court] may be made to the State Supreme Court."

It was therefore argued that, in the light of this provision, followed by the decision in *Parker v. McCarrey, supra,* 268 F.2d 907, on June 16, 1959, ruling against jurisdiction of the Ninth Circuit over appeals from the interim court, appellate review was sufficiently guaranteed in the state supreme court to make that court, and not the interim court, the highest court in the state, at least after July 29, 1959, when the state supreme court justices were appointed. See 363 U.S. 555, at 559-60. The argument was, in short, that the state supreme court was *in existence* as the highest court in the state.

This Court rejected this contention and stated (363 U.S. 555, at 560):

> "The question thus raised is not free from doubt. Viewing the case as of August 6, when the notices of appeal were filed, it is fairly arguable

that the preservation effected by Alaska Laws 1959, c. 151, § 1, of the right to appeal to the Supreme Court of Alaska constituted the interim court as a lower court of Alaska within the intent of 28 U.S.C. § 1257 to await the completion of the State's adjudicatory process as a prerequisite to adjudication here. Yet, were the promise of an appeal, however indefinitely postponed, to be taken as sufficient to bar our jurisdiction under § 1257, its equally obvious purpose to allow substantial constitutional questions to be timely brought here as a matter of right would be frustrated. Although these cases were decided below on July 2, 1959, the date set by Alaska statute for full organization of the state courts was not until January 3, 1962, Alaska Laws 1959, c. 50, §§ 31 and 32 (4). If no other fact were present, a potential delay of two and one-half years before the organization of a court to hear the preserved appeal would in itself counsel a construction against denial of our jurisdiction. Here, however, two additional facts must be weighed: (1) the Justices of the Supreme Court were actually appointed on July 29, in pursuance of a direction to accelerate the organization of the court; and (2) the effective promulgation of the rules of the court (accomplished on October 5, 1959) and appointment of a clerk were in their hands. Alaska Laws 1959, c. 50, § 32(3). While in light of these facts the question is exceedingly nice, we do not think that the assurance of a timely appeal to a court *not yet functioning* was sufficiently definite when the appeals were here filed to constitute a bar to our jurisdiction under § 1257(2)." (Emphasis added.)

Thus, this Court held in effect that because the Alaska Supreme Court was not *functioning* as of the date of filing of the notice of appeal, it was not, realistically speaking, in existence, and therefore was not the highest court in the state. And the facts in the *Metlakatla Indian* case were much stronger than in the case at bar, for here, no judges, clerks, or other officers were appointed, and no court rules were promulgated until over a year after the crucial time.

D. The District Court, Not Being in Existence, Had No Jurisdiction to Try Petitioner; the Alaska Statehood Act Does Not Provide for Retrospective Jurisdiction, Nor Can Retrospective Jurisdiction Be Implied Therefrom:

The fundamental precept of the jurisdiction of federal courts is that such jurisdiction is limited by the power granted to Congress by the Constitution, and by the terms of the grant of jurisdiction from Congress. See, *e.g., United States v. Hall* (1879) 98 U.S. 343, 345, 25 L.Ed. 180.

In *Mizell v. Vickrey* (10th Cir. 1929) 36 F.2d 327, 329, the court stated:

> "We doubt whether a court not in existence at the time an offense is committed can thereafter in any manner acquire jurisdiction. Jurisdiction must be acquired the instant a crime is committed or not at all."

Clearly, assumption of jurisdiction by the District Court in the case at bar collides head-on with the rule stated in the *Mizell* case.

It may be, that with a properly drawn statute, a retrospective grant of jurisdiction might be sus-

tained.[12] However, the general principle is that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication. See, *e.g., Bruner v. United States* (1952) 343 U.S. 112, 117, n. 8, 72 S.Ct. 581, 96 L.Ed. 786.

There is nothing in the Alaska Statehood Act which explicitly gives the new District Court retrospective jurisdiction, dating from the time that court became organized and began to function. On the contrary, jurisdiction during the interim period is vested in the interim court by virtue of the provisions of section 18.

Nor is there any necessary or even reasonable implication of retrospective jurisdiction. The implication is quite the other way. Section 15 of the Act expressly provides for transfer of cases pending in the old territorial court as of the date of admission to statehood to the new District Court. Section 18 gives the interim court jurisdiction over offenses committed during the interim period between admission to statehood and creation of the new District Court. The act is silent as to the jurisdiction of the District Court over offenses committed during the interim period. The inclusion of provisions expressly giving the new District Court retrospective jurisdiction over cases pending in the territorial court as of the date of admission to statehood, and expressly giving the interim court jurisdiction over cases arising after

[12]See, *e.g., Duncan v. Missouri* (1894) 152 U.S. 377, 14 S.Ct. 570, 38 L.Ed. 485.

such date but before the commencement of functioning of the District Court, plus the absence of provisions saving District Court jurisdiction over offenses committed during the interim period, leads to the implication that such jurisdiction is excluded by omission. The Court of Appeals so found in the first appeal, when it considered the effect of express provisions for transfer of cases pending as of statehood, coupled with the absence of provisions permitting transfer from the interim court to the District Court of cases arising during the interim period. The majority opinion held (*Woodring v. United States, supra,* 304 F.2d 308, at 309-310):

> "While courts of general jurisdiction normally have the powers they ought to have, still the rule of 'the inclusion of one excludes the other' would have to search long to find a better place to be applicable. Provision was made only for transfer of causes to the United States District Court for the District of Alaska which were pending on the date of admission. . . . To have this Section 15 carry over to federal criminal cases filed after January 3, 1959, in the [interim] Court, in our view would handmake language which is not there. To put the language there would be a case of doing what one would have done if he had had the thought to do it at the critical time."

The construction urged by petitioner would not require the anomalous result[13] that no court would

[13]But even an anomalous result must prevail if the statutory provisions or absence of provisions so compel. At least one court has so characterized the holding of *Parker v. McCarrey, supra,* 268 F.2d 907, that the Ninth Circuit had no appellate jurisdiction

have had jurisdiction to try him. His case at the outset could have been processed to its conclusion in the interim court, pursuant to section 18 of the Alaska Statehood Act. As Circuit Judge Hamlin noted in his dissent in the first appeal (304 F.2d 308, 310, at 312, n. 3):

> "No reason is readily apparent why appellant was not tried in the interim court. Over 15 months elapsed from the date of appellant's [first] indictment (March 11, 1959) to the date of his [first] trial in the new District Court for Alaska (June 15, 1960)."

The dilemma in which petitioner is left by the judgment and opinion of the court below is best expressed by quotation from that opinion (337 F.2d 235, at 236):

> "If the existence of a court was necessary on January 9, 1959 [sic], the date of the robbery, which could receive an indictment and try the robber, we say there was one or more. In the thirteen months and seventeen days between proclamation of statehood and the second proclamation, February 20, 1960, we say there was no

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over appeals from the interim court, stating that the elimination of such appellate jurisdiction was compelled by inadvertent error in the drafting of section 12(e) of the Alaska Statehood Act. *Hobbs v. State, supra,* n. 10, 359 P.2d 956, 960, 962. *Forsyth v. United States* (1850) 50 U.S. (9 How.) 571, 13 L.Ed. 262, may also be characterized thus. Forsyth was indicted in a Florida territorial court for a federal crime *after* the unconditional admission of Florida into the Union, no provision saving jurisdiction having been made. Thereafter, Congress enacted legislation allowing transfer of such cases to the new United States District Court. The Supreme Court of the United States, following *Benner v. Potter* (1850) 50 U.S. (9 How.) 235, 13 L.Ed. 119, held that on the unconditional admission of Florida to statehood, the jurisdiction of the territorial courts ceased, so that the indictment of Forsyth was void, thus preventing the new District Court from trying him on said indictment.

judicial vacuum. *Perhaps the United States District Court for the District of Alaska had an existence from January 3, 1959, before it was staffed. Perhaps it didn't.* Perhaps there were two courts with concurrent jurisdiction. If Woodring had been legally damaged by anything done by a court (or something passing as a court) prior to the demise of the interim court, it might be necessary to decide the court's status in the interim period. *To define now the status of the court or courts would be dicta. That issue should be resolved for parties that are vitally interested."* (Emphasis added.)

Petitioner submits that trial and conviction by a court without jurisdiction is legal damage done by a court or something passing as a court. Determination of the jurisdiction of the court that tried and convicted him is not "dicta"; it is a constitutional prerequisite to the validity of that conviction. No one is more vitally interested in the resolution of that issue than petitioner.

II

THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT, IN A CIRCUMSTANTIAL EVIDENCE CASE, ON "EXCLUSION OF EVERY REASONABLE HYPOTHESIS BUT THAT OF GUILT", WHEN CONSIDERED IN CONNECTION WITH THE INSTRUCTIONS GIVEN ON REASONABLE DOUBT:

As set forth in the statement of facts, the evidence of guilt in this case was entirely circumstantial. Petitioner requested the following instruction (T-I 29):

"To justify conviction of crime where the evidence relied upon by the prosecution is purely

> circumstantial, as it is in this case, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. In other words, unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the jury to find the Defendant not guilty."

The District Court refused to give this instruction, over petitioner's objection. (T-V 568-69.) Instead, again over petitioner's objections (T-V 582-84), the court gave the following instruction (T-I 51):

> "There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence—such as the testimony of an eye-witness. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the commission of the offense.
>
> "As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case."

The District Court then gave, in its instructions on reasonable doubt, the following definitions (T-I 17-18):

> "A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established *if the evidence is such as you would be willing to rely and act upon in the most important of your own*

> *affairs.* A defendant is not to be convicted on mere suspicion or conjecture." (Emphasis added.)

Despite petitioner's objection (T-V 587-88), the court also instructed as follows (T-I 63):

> "There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them."

The refusal of the District Court to give the "exclusion of every reasonable hypothesis" instruction was based on the holding of this Court in *Holland v. United States* (1954) 348 U.S. 121, 139-40, 75 S.Ct. 127, 99 L.Ed. 150, rehearing *denied* (1955) 348 U.S. 932, 75 S.Ct. 334, 99 L.Ed. 731. The *Holland* case criticized such an instruction as confusing, and justified a refusal to give it *where the jury was properly instructed on reasonable doubt.*

Even after *Holland,* there seems to be some confusion in the circuits as to what the proper rule is. *Compare, e.g., Brown v. United States* (8th Cir. 1957) 245 F.2d 549, 556 *with United States v. LaRocca* (D.C. Mo. 1963) 219 F.Supp. 53, 54.

But at any rate, the *Holland* case was based on an assumption that the jury is properly instructed on reasonable doubt. It is true that in *Holland,* there was an instruction on reasonable doubt quite similar to the emphasized portion of the court's charge in the instant case, quoted above. It was there said (348 U.S. 121, at 140):

> "We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297, 303, rather than the kind on which he would be willing to act. But we believe that the instruction as given was not of the type that could mislead the jury intc finding no reasonable doubt when in fact there was some. A definition of doubt as something the jury would act upon would seem to create confusion rather than misapprehension. . . . [A]nd we feel that, taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury."

Petitioner respectfully submits that there is an exceedingly subtle distinction between confusion and misapprehension and that a jury confused on the subject of reasonable doubt cannot be said to have been properly instructed thereon so as to justify refusal, in a circumstantial evidence case, of an instruction on "exclusion of every reasonable hypothesis other than that of guilt." It is respectfully urged that this Court in *Holland* did not connect its criticisms of the instructions there given on reasonable doubt with its stated rationale for upholding the refusal to instruct on "exclusion of every reasonable hypothesis", and that the holding of *Holland* should therefore be re-examined in that light.

The problem is compounded in the instant case because the District Court gratuitously instructed that there was nothing different about the way to consider proof in a criminal case from that in which reasonable

persons treat any question depending upon evidence presented. This is simply not true. Few persons, even the most reasonable ones, require proof beyond a reasonable doubt. This instruction, combined with the one defining reasonable doubt as the kind upon which one would be willing to act, so waters down the concept of reasonable doubt, and so muddies those waters, that the jury is left with an idea of the degree of proof required to convict no more stringent than "preponderance of the evidence." Therefore, the refusal to instruct on "exclusion of every reasonable hypothesis" cannot be overlooked on the basis that the jury was properly instructed on reasonable doubt. And where the evidence of guilt was as razor thin as in the case at bar, error in refusing to give such an instruction is perforce prejudicial.

III

THE DISTRICT COURT ERRED IN COMMENTING TO THE JURY AND INSTRUCTING THE JURY ON THE SUBJECT OF PETITIONER'S FIRST TRIAL AND CONVICTIONS:

At the outset of the trial, the District Court judge commented to the jury that the case had been previously tried, appealed and reversed. (T-III 11.) The judge then commented (ibid.):

> "So each of you is to entirely disregard that, because by virtue of the case being reversed on appeal, it's as though that other action, insofar as we are concerned here, it is just like the other case never happened, and you cannot and must not consider it at all, *and the fact that he may*

> *have been convicted* in the other case has no bearing whatsoever on the trial of this case." (Emphasis added.)

On September 13, 1963, during the course of the trial, the following news item appeared in the local newspaper (T-I 76-77):

> "State's witnesses in the jury trial of Richard A. Woodring, 41, charged with robbing a bank in Fairbanks on Jan. 12, 1959, will continue to take the stand today in U.S. District Court beginning at 10 a.m.
>
> "The retrial of Woodring, previously who had been found guilty and then acquitted, began Monday and so far has centered on testimony of witnesses for the state, many of whom have been brought to Fairbanks from the smaller states for the trial.
>
> "Witnesses for the defense are expected to begin taking the stand about noon today.
>
> "Woodring had been making his home in Oklahoma when he was re-indicted. He is also charged with interstate transportation of stolen property.
>
> "The state prosecutor is James Clouse of the U.S. Attorney's Office, Anchorage, while Eugene Miller of Fairbanks is attorney for the defendant.
>
> "Woodring's plea is mute, pleading neither innocent nor guilty."

On September 14, 1963, one of the jurors contacted the judge's secretary and inquired about the news item. The judge did not speak to the juror. (T-I 77.) However, on reconvening court, the judge stated to the jury (T-V 555):

"Before recess or adjourning one of the jurors was bothered about the item in last-night's newspaper about the previous trial and this trial, and I thought I had made that very clear that that trial has nothing whatsoever to do with the present case. It's no concern of the jury.

"It has been mentioned from time to time and the court will instruct you in writing when the other instructions are given as to the fact that you are not to consider it.

"But the facts are that the case was previously tried by this court, with Judge Hodge sitting, on an indictment returned by the so-called interim court. He was convicted. He appealed, *he was convicted on Counts 1 and e* [sic], he appealed, I think it was in June of 1962. The Ninth Circuit Court reversed, saying that the Enabling Act, the Statehood Act, contained *no provision whereby an indictment could be transferred from the interim court to this court, which is a Constitutional Court, a United States District Court.* So the effect of the reversal on appeal was to erase all proceedings, nullify all proceedings which were previously had, and likewise the jury are not to consider it in any light whatsoever insofar as this trial is concerned, and you will be instructed in writing as to that subject." (Emphasis added.)

Petitioner's counsel objected to the giving of any instruction to the jury about the previous trial and conviction. The court noted the objection, commented that the instruction to be given had been jointly submitted by the prosecution and petitioner's associate counsel (who did not try the case) (T-V 660), and gave the following instruction (T-I 35):

> "During the course of this trial I stated that you would receive a written instruction on the prior proceedings in this matter. You are therefore instructed that this case was previously tried by this Court in June of 1960. Subsequent to that trial the case was appealed to the United States Court of Appeals for the Ninth Circuit and *the conviction was set aside on the ground that there was no provision in the Alaska Statehood Act whereby an indictment returned by the Territorial Interim Court could be transferred to and tried by the United States District Court* for the District of Alaska. The result of this was to set aside all the previous proceedings. You are instructed that this is for your information only and is not to be considered by you in any way whatsoever so far as this trial is concerned. You are therefore instructed to disregard all prior proceedings and to consider only the evidence presented to you in this trial. You are not to consider the *previous conviction* as any evidence in this case or presumption of guilt." (Emphasis added.)

On his motion for new trial, petitioner submitted the fact of the juror's reading of the above mentioned news item and the judge's instruction on the previous trial as error, claiming that no instruction at all should have been given on the subject. (See T-I 70, 74.)

Petitioner urges this Court that the judge's comments to the jury, the fact that a juror read the news item, and the judge's instruction to the jury on the subject constitute prejudicial error. These matters emphasized the fact that petitioner had already been

convicted by a jury of the same offenses for which he was now being tried, and must have tended, at least in the mind of a layman, to lead to a belief that the reversal was on a mere technical point. Despite the judge's attempts to admonish the jury to the contrary, it is inconceivable that the jury, in assessing petitioner's guilt or innocence, was not influenced by the thought that another jury had believed him to be guilty and that his conviction had been upset on a mere technicality. Considering the totally circumstantial nature of the case against petitioner, and the very weak evidence of guilt, such an extraneous influence on the jury's deliberations must be considered to have been highly prejudicial.

CONCLUSION

Petitioner urges that, for the reasons above stated, this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Dated, San Francisco, California,
December 30, 1964.

Respectfully submitted,
SCHOFIELD, HANSON, BRIDGETT,
MARCUS & JENKINS,
ARTHUR T. BRIDGETT,
JOHN J. VLAHOS,
Attorneys for Petitioner.

(Appendices A and B Follow)

Appendix A

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS:

1. **Alaska Statehood Act (Alaska Enabling Act), Public Law, 85-508, July 7, 1958, 72 Stat. 339, 348-50 §§12-18 (Title 48 U.S.C.A., Ch. 2, pp. 12-13 [1963 Pocket Part]):**

. . . .

SEC. 12. Effective upon the admission of Alaska into the Union—

(a) The analysis of chapter 5 of title 28, United States Code, immediately preceding section 81 of such title, is amended by inserting immediately after and underneath item 81 of such analysis, a new item to be designated as item 81A and to read as follows:

"81A. Alaska";

(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof a new section, to be designated as section 81A, and to read as follows:

"§ 81A. Alaska

"Alaska constitutes one judicial district.

"Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.";

(c) Section 133 of title 28, United States Code, is amended by inserting in the table of districts and judges in such section immediately above the item: "Arizona * * * 2", a new item as follows: "Alaska * * * 1";

(d) The first paragraph of section 373 of title 28, United States Code, as heretofore amended, is further amended by striking out the words: "the District Court for the Territory of Alaska,": *Provided,* That the amendment made by this subsection shall not affect the rights of any judge who may have retired before it takes effect;

(e) The words "the District Court for the Territory of Alaska," are stricken out wherever they appear in sections 333, 460, 610, 753, 1252, 1291, 1292, and 1346 of title 28, United States Code;

(f) The first paragraph of section 1252 of title 28, United States Code, is further amended by striking out the word "Alaska," from the clause relating to courts of record;

(g) Subsection (2) of section 1294 of title 28, United States Code, is repealed and the later subsections of such section are renumbered accordingly;

(h) Subsection (a) of section 2410 of title 28, United States Code, is amended by striking out the words: "including the District Court for the Territory of Alaska,";

(i) Section 3241 of title 18, United States Code, is amended by striking out the words: "District Court for the Territory of Alaska, the";

(j) Subsection (e) of section 3401 of title 18, United States Code, is amended by striking out the words: "for Alaska or";

(k) Section 3771 of title 18, United States Code, as heretofore amended, is further amended by striking

out from the first paragraph of such section the words: "the Territory of Alaska,";

(l) Section 3772 of title 18, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "the Territory of Alaska,";

(m) Section 2072 of title 28, United States Code, as heretofore amended, is further amended by striking out from the first paragraph of such section the words: "and of the District Court for the Territory of Alaska";

(n) Subsection (q) of section 376 of title 28, United States Code, is amended by striking out the words: "the District Court for the Territory of Alaska,": *Provided,* That the amendment made by this subsection shall not affect the rights under such section 376 of any present or former judge of the District Court for the Territory of Alaska or his survivors;

(o) The last paragraph of section 1963 of title 28, United States Code, is repealed;

(p) Section 2201 of title 28, United States Code, is amended by striking out the words: "and the District Court for the Territory of Alaska"; and

(q) Section 4 of the Act of July 28, 1950 (64 Stat. 380; 5 U.S.C., sec. 341b) is amended by striking out the word: "Alaska,".

SEC. 13. No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall

become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska.

SEC. 14. All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed.

All cases in which final judgment has been rendered in such district court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require: *Provided,* That the time allowed by existing law for appeals from the district court for said Territory shall not be enlarged thereby.

SEC. 15. All causes pending or determined in the District Court for the Territory of Alaska at the time of admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United

States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts.

SEC. 16. Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court.

SEC. 17. All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals to the appellate courts created by said State, and also with the same right to prosecute appeals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to

the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States.

SEC. 18. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section.

2. Proclamation No. 3269, January 3, 1959, 24 F.R. 81; 1959 U.S. Code Cong. & Ad. News 939, 48 U.S.C., note preceding section 21:

ADMISSION OF THE STATE OF ALASKA INTO THE UNION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Congress of the United States by the act approved on July 7, 1958 (72 Stat. 339), accepted, ratified, and confirmed the constitution adopted by a vote of the people of Alaska in an election held on April 24, 1956, and provided for the admission of the State of Alaska into the Union on an equal footing with the other States of the Union upon compliance with certain procedural requirements specified in that act; and

WHEREAS it appears from information before me that a majority of the legal votes cast at an election held on August 26, 1958, were in favor of each of the propositions required to be submitted to the people of Alaska by section 8(b) of the act of July 7, 1958; and

WHEREAS it further appears from information before me that a general election was held on November 25, 1958, and that the returns of the general election were made and certified as provided in the act of July 7, 1958; and

WHEREAS the Acting Governor of Alaska has certified to me the results of the submission to the people of Alaska of the three propositions set forth in section 8(b) of the act of July 7, 1958, and the results of the general election; and

WHEREAS I find and announce that the people of Alaska have duly adopted the propositions required to be submitted to them by the act of July 7, 1958, and have duly elected the officers required to be elected by that act:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby declare and proclaim that the procedural requirements imposed by the Congress on the State of Alaska to entitle that State to admission into the Union have been complied with in all respects and that admission of the State of Alaska into the Union on an equal footing with the other States of the Union is now accomplished.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington at one minute past noon on this third day of January in the year of our Lord nineteen hundred and
[SEAL] fifty-nine, and of the Independence of the United States of America the one hundred and eighty-third.

DWIGHT D. EISENHOWER

By the President:

CHRISTIAN A. HERTER,

Acting Secretary of State.

3. **Executive Order No. 10867, February 20, 1960, 25 F.R. 1584; 1960 U.S. Code Cong. & Ad. News 1661-62:**

READINESS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA TO ASSUME THE FUNCTIONS IMPOSED UPON IT.

WHEREAS the act of July 7, 1958, 72 Stat. 339, relating to the admission of the State of Alaska into the Union, provides that the United States District Court for the Territory of Alaska shall continue to function as theretofore for a period of three years after the effective date of that act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of that act, is prepared to assume the functions imposed upon it; and

WHEREAS that act further provides that its provisions relating to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of the rights of litigants in suits before such courts shall not be effective until the expiration of the above-mentioned three-year period or until such Executive order is issued; and that the tenure of the judges, the United States Attorneys, Marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function; and

WHEREAS, I have appointed, by and with the advice and consent of the Senate, and commissioned

the Honorable Walter N. Hodge to be United States District Judge for the District of Alaska, and he has taken his oath of office; and

WHEREAS Judge Hodge has appointed an acting United States Attorney, an acting United States Marshal, and other court officers; and

WHEREAS the United States District Court for the District of Alaska is now prepared to assume the functions imposed upon it:

NOW, THEREFORE, by virtue of the authority vested in me by section 18 of the said act of July 7, 1958, I hereby proclaim that the United States District Court for the District of Alaska is prepared to assume the functions imposed upon it. Accordingly, the jurisdiction of the District Court for the Territory of Alaska and the tenure of the judges, the United States Attorneys, Marshals, and other officers of that court are now terminated.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,
February 20, 1960.

Appendix B

OPINIONS:

1. **Woodring v. United States, No. 19,184 (9th Cir. 1964):**

United States Court of Appeals
for the Ninth Circuit

No. 19,184

RICHARD A. WOODRING,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

[September 16, 1964]

On Appeal from the United States District Court
for the District of Alaska

Before: CHAMBERS, MERRILL and KOELSCH, Circuit Judges.

CHAMBERS, Circuit Judge:

Two Alaska juries seem to think that Woodring robbed the Airport Road Branch of the Alaska National Bank, Fairbanks, on January 12, 1959. He has been twice convicted and sentenced for doing so.

Now the question really comes down to: Does he get a legal windfall out of the awkward transition from the Territorial Courts of Alaska to the United States District Court for the District of Alaska now operating in the State of Alaska?

The Alaska Enabling Act, Public Law 85-508, July 7, 1958, provided for the old territorial courts to operate for awhile after statehood and to administer both federal and state justice. The old territorial courts, after statehood was proclaimed on January 3, 1959, (24 F.R. 81) until their demise by presidential proclamation (25 F.R. 1584), became known popularly as the "Interim Courts."

For the federal offense here, Woodring was first indicted by a grand jury impaneled by the interim court, which was a federal court at least in the sense that it was supported wholly by the federal government. As the interim court was about to expire on February 20, 1960, by presidential proclamation, the judge of the interim court at Fairbanks transferred the case (the first indictment) to the newly manned United States District Court for the District of Alaska. In the latter court, Woodring was first convicted in June, 1960, of the bank robbery.

We held that the Alaska Enabling Act was so unfortunately drawn that it just did not provide for the transfer of a criminal case arising with the interim court to the newly manned district court and that the district court then, over Woodring's objection, with the then history of the case, did not have the power to

try him. Woodring v. United States, 304 F.2d 308 (The act did provide for the transfer of cases pending on the date statehood became effective.)

So, in February, 1963, he was reindicted in the United States District Court for the District of Alaska and tried and convicted in September, 1963.

We do not deem it required or important even yet to delineate what were the powers of the interim court. That court may have inconvenienced Woodring, but it never legally hurt him. Also, we need not yet decide whether the United States District Court for the District of Alaska was created with statehood on January 3, 1959, or when it was organized later.

There is no doubt that Section 2113(a) of Title 18, United States Code, had been passed before January 12, 1959, the date of the robbery of the national bank with which we are here concerned.

Woodring is convinced that the United States District Court for the District of Alaska was not in existence on January 12, 1959, and therefore it could never acquire jurisdiction. He relies on Mizell v. Vickrey, 36 F.2d 327, and United States v. Hall, 98 U.S. 343, for the latter proposition, assuming the first to be correct. We simply cannot get out of the two cases what appellant finds in them. If his thesis were correct, then the one who robbed a national bank in Hawaii the day before statehood there could not have been indicted the day after statehood and tried in the constitutional court established by the Enabling Act for Hawaii, 73 Stat. 4. (We mention Hawaii simply

because there the problems of transition were not confounded by the establishment of an interim court.)

If the existence of a court was necessary on January 9, 1959, the date of the robbery, which could receive an indictment and try the robber, we say there was one or more. In the thirteen months and seventeen days between proclamation of statehood and the second proclamation, February 20, 1960, we say there was no judicial vacuum. Perhaps the United States District Court for the District of Alaska had an existence from January 3, 1959, before it was staffed. Perhaps it didn't. Perhaps there were two courts with concurrent jurisdiction. If Woodring had been legally damaged by anything done by a court (or something passing as a court) prior to the demise of the interim court, it might be necessary to decide the court's status in the interim period. To define now the status of the court or courts would be dicta. That issue should be resolved for parties that are vitally interested.

We find the one objection to the rejection of evidence without merit.

Woodring also asserts the double jeopardy clause of the Fifth Amendment to the Constitution. Our first decision was that when the United States District Court for the District of Alaska first tried Woodring (because of the quirk of how the case got into that court) that court simply had no jurisdiction—at least from the time Woodring, before trial, objected to it. If the trial court had no jurisdiction, Woodring just was not in jeopardy the first time. This he could have

found out early by seeking the classic writ of prohibition. But he did not. Now he complains of the anxiety and embarrassment of two trials.

It is well established that one who secures a reversal of a conviction on a mere error of law is not subjected to double jeopardy when he is retried. See United States v. Tateo, 375 U.S. 877, 12 L.Ed. 2d 448. Obviously a retrial, when at the first trial the court did not have jurisdiction, presents an a fortiori situation for non-double jeopardy.

Woodring also attacks the sufficiency of the evidence, much of which was circumstantial. We have reviewed the evidence and find that although the jury might have found the defendant not guilty (and still have been true to its oath), yet there was an abundance of evidence from which it could have found beyond a reasonable doubt that he was guilty. "Beyond a reasonable doubt" does not mean "inescapably."

(The foregoing opinion assumes a familiarity with Parker v. McCarrey, 9 Cir., 268 F.2d 907; Mehlum v. Carson, 9 Cir., 304 F.2d 285; and the first Woodring case, supra.)

The judgment is affirmed.

2. Woodring v. United States, No. 17,094 (9th Cir. 1962) 304 F.2d 308:

United States Court of Appeals
for the Ninth Circuit

No. 17,094

RICHARD A. WOODRING,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

June 7, 1962.

Rehearing Denied July 24, 1962.

Before CHAMBERS, HAMLIN and KOELSCH, Circuit Judges.

CHAMBERS, Circuit Judge.

Someone is guilty of "holding up" the Airport Road Branch of the Alaska National Bank of Fairbanks on the afternoon of January 12, 1959, and escaping with about fourteen thousand dollars in cash. Woodring, under one indictment has been found guilty of several offenses in connection with that occurrence. The direct evidence was weak of Woodring's guilt, but there was probably enough circumstantial evidence to support the jury verdict. However, we do not reach that ques-

tion because of our view of the threshold jurisdictional question.

The executive proclamation[1] pursuant to the Enabling Act[2] of July 7, 1958, establishing Alaska as the 49th State of the Union, was issued and effective January 3, 1959, nine days before the robbery.

By Section 18[3] of the Enabling Act, the old federal territorial court and its four divisions were continued for a period of three years subject to earlier termination on conditions. Deeming the conditions met, the President on February 20, 1960, by proclamation,[4] terminated the federal territorial court, a year, one month and 17 days after statehood.

The trouble here starts with Woodring being indicted in the territorial district court, fourth division,

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[1]Proclamation No. 3269, 24 F.R. 81.

[2]Public Law 85-508, 72 Stat. 339, 48 U.S.C.A. preceding section 21.

[3]Section 18 provided as follows:

"Jurisdiction of District Court; termination date. The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section."

[4]Executive order No. 10,867, 25 F.R. 1584.

on March 11, 1959, two months and eight days after statehood. And, there he entered his pleas. Then he was tried in the United States District Court for the District of Alaska in June, 1960. Doggedly Woodring has resisted at all pertinent times the jurisdiction of the United States District Court for the District of Alaska to try him.

We hold that the judgment must be reversed on the narrow ground that the Enabling Act did not provide for the transfer of cases such as this to the United States District Court for the District of Alaska. Section 15, as pertinent, reads as follows:

> "All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State Court of Alaska. * * *"

While courts of general jurisdiction normally have the powers they ought to have, still the rule of "the inclusion of one excludes the other" would have to search long to find a better place to be applicable. Provision was made only for transfer of causes to the

United States District Court for the District of Alaska which were pending on the date of admission (January 3, 1959).[5] To have this Section 15 carry over to federal criminal cases filed after January 3, 1959, in the Territorial Court, in our view would handmake language which is not there. To put the language there would be a case of doing what one would have done if he had had the thought to do it at the critical time.

Our opinion is fortified by our reading of Benner v. Potter, 9 How. 235, 13 L.Ed. 119, and Forsyth v. United States, 9 How. 571, 13 L.Ed. 262. While the decisions stand on a number of grounds, we note the importance attached by the Supreme Court to the lack of transfer provision in the Enabling Act for the admission of Florida on March 3, 1845, 5 Stat. at L. 542,

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[5]The presiding judge of the Fourth Division of the United States District Court for the Territory (then State) of Alaska on February 19, 1960, apparently as one of his last acts, and with considerable acuteness of the statutes and proclamations involved, issued a general transfer order, as an "attempted compliance" with Public Law 85-508, and "particularly" with respect to "Section 15 thereof" in pertinent part as follows:

"It Is Hereby Ordered that all causes pending or determined in the above-entitled courts for the Second and Fourth Judicial Divisions at the time of the admission of Alaska as a State, • • • which, at the time of said admission of Alaska as a State, to-wit, at one minute past noon on the third day of January, 1959, at the City of Washington, District of Columbia, were of such nature as to then be within the jurisdiction of a district court of the United States, for which purposes the above-entitled Court is not to be so construed or considered, are hereby transferred to the United States District Court for the District of Alaska; • • •

"It Is Further Ordered that the above and foregoing Order take effect at one minute prior to the issuance hereafter of that Executive Order provided for in Section 18 of Public Law 85-508."

Thus, it may be seen that no effort was made to transfer cases started after January 3, 1960. Apparently, he read the Enabling Act as this court does.

and the federal statute establishing the United States District Court for the District of Florida March 3, 1845, 5 Stat. at L. 788. See the Benner opinion at page 245 and the Forsyth case at page 577. (Congress did not authorize the continuance of the Florida territorial court when statehood was granted and the Benner case held it was not continued by implication.)

In holding as we do, we appreciate that we must probably let a guilty man go; that we leave unresolved many questions and, perhaps, create new ones. But we cannot render an advisory opinion. Questions which we do not reach include:

1. Suppose Woodring had never objected to the jurisdiction of the new United States District Court for the District of Alaska. That is, did the court have naked power to act—if unchallenged?

2. Suppose this were a civil case instead of a criminal case with the same dates involved. What would we do?

3. Was there a United States District Court for the District of Alaska in existence without a judge or other staff from January 3, 1959, to the date Judge Walter H. Hodge qualified on February 19, 1960, as the first constitutional United States District Judge for the District of Alaska?

4. What about essentially federal criminal or civil cases that may have been tried or otherwise disposed of by the interim court, the territorial court continued as aforesaid, between January 3, 1959, and February 20, 1960?

As in Parker v. McCarrey, we find that the last minute addition of Section 18 of the Enabling Act did not search far enough back through the act to correct inconsistencies. It would be easy enough to criticize the draftsman of the amendment almost three years later after calm thought, but he may have done very well in the exigency of the moment with which he was faced in 1958.

However, we do point out that here was a case where the solution was easily at hand on February 20, 1960. Although the opinion in Parker v. McCarrey, 9 Cir., 268 F.2d 907, did not reach in any way the Woodring problem, still trouble was forecast in the briefs presented in that case. The obvious course on February 20, 1960, was to play safe and reindict Woodring and others similarly situated.

Judgment reversed.

HAMLIN, Circuit Judge.

I respectfully dissent.

When Alaska became the 49th State of the Union on January 3, 1959, there were no state courts ready to perform judicial functions. Furthermore, on that date Alaska ceased to be a territory of the United States, and the new United States District Court for the State of Alaska was likewise not ready to perform its functions. Strictly speaking, the former United States District Court for the Territory of Alaska could no longer exist without there being a territory. See Benner v. Potter, 9 How. 235, 50 U.S. 235, 13 L.

Ed. 119 (1850); Parker v. McCarrey, 268 F.2d 907 (9th Cir. 1960). Nevertheless, Congress foresaw the existence of an interim period between the time when Alaska became a state and the time when its courts and the new federal district court could operate. In order to alleviate the difficulties inherent in a situation where there would be no courts Congress created a special court to perform judicial functions during the interim period. Hereinafter this special court will be called the "interim court."

The interim court was created by section 18 of the Alaska Statehood Act, 72 Stat. 339 (1958):

> "The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section."

From a reading of section 18 it is readily apparent that Congress intended to fill the interim by merely providing for the continued existence of the old Territorial Court until three years after Alaska was admitted as a state or until such earlier time as the President proclaimed the new District Court for the District of Alaska ready to operate. Congress probably did not foresee that the interim court might have different characteristics and serve different purposes than the old Territorial District Court. On the contrary, it would appear that Congress intended the creation of the interim court to be a simple and practical way to fill a void created by Alaska's inability to have its state courts open for business on January 3, 1959, when Alaska became a state.[1]

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[1]See note 5 infra and accompanying text.

Just what the precise nature of the interim court is is a difficult problem. If the interim court is neither a territorial court nor the District Court for the State of Alaska it must be a special court with perhaps some unique characteristics. The Supreme Court had occasion to partially consider the nature of the interim court in Metlakatla Indian Community, etc. v. Egan, 363 U.S. 555, 80 S.Ct. 1321, 4 L.Ed.2d 1397 (1960). In this case the problem was whether the Court had jurisdiction over an appeal from the interim court under 28 U.S.C.A. § 1257(2) which provides for appeal to the Supreme Court from final judgments or decrees rendered by the highest court of a state where constitutional validity of a state statute is involved. The questions were (1) Was the interim court a state court within the meaning of § 1257? and (2) Was the interim court the highest state court of Alaska when the decisions appealed from were rendered? The Supreme Court answered both questions in the affirmative. The interim court was a state court because it was invested with the judicial power of the State by the State's legislature. The interim court was the highest court of the State at the time the decision appealed from was rendered because Alaska's State Supreme Court was not yet open for business.

The Court said of the interim court:

"It is apparent • • • that the [interim] court is to a significant degree the creature of two sovereigns acting cooperatively to ac-

On February 20, 1960, the President, by executive order,[2] proclaimed that the new District Court for the District of Alaska was ready to perform its functions. On this date, then, the interim court ceased to exist. By the terms of section 18 of the Alaska Statehood Act the prior specific provisions relating to the termination of jurisdiction, continuation of suits and succession of courts became effective. Section 15 of the Act provides in part:

> "All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by the law with reference to the judgments and decrees in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as

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complish the joint purpose of avoiding an interregnum in judicial administration in the transitional period." (363 U.S. at 558, 80 S.Ct. at 1323.)

Although the court carefully avoided deciding if and to what extent the interim court was a federal court, it is firmly believed that the Court if presented with the question would decide that the interim court was a federal court (even though such a holding would not be absolutely necessary in order to arrive at the result contended for in this opinion). The above quotation from Metlakatla points up the joint desires of Congress and the Alaska legislature to fill an interregnum. Congress did its part by incorporating section 18 into the Alaska Statehood Act, and it must certainly have intended the interim court to fill a federal interregnum as well as a state interregnum.

[2]Executive Order, No. 10867, 25 Fed.Reg. 1584 (1960).

> a State shall be transferred to the appropriate State court of Alaska."

In the instant case the indictment against the appellant was not returned until after January 3, 1959, when Alaska became a state, and thus, the case against the appellant was not "pending" at the time Alaska became a state. The majority has decided that, because of section 15, the new District Court for the District of Alaska could have no jurisdiction over the appellant based on an indictment returned in the interim court since there was no provision for the transfer of cases which were not pending in the old Territorial Court on January 3, 1959.[3]

At the outset it must be admitted that Congress' use of the word "pending" in sections 13-17 was unfortunate and careless; however, it is not necessary to rely on any of those sections (13-17) to say that an indictment from the interim court could provide the basis for a trial in the new District Court. This is so because section 18 which creates the interim court and

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[3]No reason is readily apparent why appellant was not tried in the interim court. Over 15 months elapsed from the date of appellant's indictment (March 11, 1959) to the date of his trial in the new District Court for Alaska (June 15, 1960). My reading of the record discloses that the appellant did not object to the jurisdiction of the interim court nor of the new District Court until he filed a motion to arrest judgment (under Rule 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A.) after the verdicts of guilty were returned. (The jurisdiction of the court can be raised at any time during the pendency of the proceeding. Rule 12 of the Federal Rules of Criminal Procedure.) Of course, these facts neither militate for nor against the position taken by the majority in their opinion or that taken by this opinion that the new District Court had the power to try the appellant upon the indictment from the interim court.

holds sections 13-17 in abeyance for the interim period is a completely separate and independent section. In order to give efficacy to section 18 and Congress' intent to fill a void in court administration during the interim the result must be that cases started during the interim could be completed in the new District Court. Thus, while sections 13-17 provided specifically for the transfer, continuation, etc., of cases pending in the Territorial Court, section 18 in creating the interim court, *ipso facto*, provided for the transfer of cases started during the interim. No specific provision for the transfer of cases started in the interim court was required because jurisdiction over such cases would be vested in the newly created courts of Alaska by operation of law. At worst the scheme developed by Congress for the succession of courts and transfer of cases envisioned mere ministerial acts of transfer, etc., upon the formation of the new court system.[4]

If section 18 is not read broadly to provide for the transfer of cases from the interim court the whole

[4]It is believed that the majority would not object to the proposition that the old Territorial Court was not the interim court and was something different therefrom. See Parker v. McCarrey, 268 F.2d 907 (9th Cir. 1960). Thus, the position that no specific section providing for the transfer of cases started in the interim was necessary is more persuasive in view of this difference. Sections 13-17 when read apart from section 18 relate only to the transfer of cases, etc., from the Territorial Court. If the interim court is something different from the Territorial Court (notwithstanding the phraseology used in section 18 in creating the interim court) sections 13-17 do not relate to any cases started therein; and the necessarily implied Congressional intent to have the interim court mean something supplies, by inference, the authority for the transfer of interim cases to the new Alaska federal or state courts as the case may be.

purpose of creating the interim court is undermined. It is well known that the completion of cases is a lengthy process often requiring several years. While this may not be as true with respect to criminal cases as with civil cases there is no sound reason to distinguish them for the purposes of the problem in this case. Since Congress had no way of knowing how long the interim period was to be (if less than three years) it certainly would not have created a court to act during this interim period if it thought that no case started therein could be completed by the new Alaska state or federal courts. It is patently unreasonable to assume otherwise. The only purpose of creating the interim court at all would be to fill an anticipated void in judicial administration thus promoting the orderly transformation of Alaska from a territory into a state.

The existence of section 18 along with the previous sections 13-17 creates a doubt as to just what Congress did provide for in the Statehood Act. When a court is faced with such a doubt it must endeavor to effectuate the purposes of the legislation and the intent of the legislators in passing it.[5] The intent to have a smooth changeover from the territorial court system to the state system is readily apparent when sections 13-18 are read as a whole. This intent is bolstered

[5]See, e. g., United States v. Union Pacific R. Co., 353 U.S. 112, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957); United States v. Brown, 333 U.S. 18, 26, 68 S.Ct. 376, 92 L.Ed. 442 (1948); People of Puerto Rico v. Shell Co., 302 U.S. 253, 258, 58 S.Ct. 167, 82 L.Ed 235 (1937); United States v. Freeman, 3 How. 556, 565, 11 L.Ed. 724, 728 (1845).

somewhat by the House of Representatives Report entitled "Alaska—Admission into Union," wherein the only reference to the sections here involved is made:

> "Sections 13 through 17 provide for a continuation of suits, the succession of courts, the saving of rights of litigants in the courts. These five sections are recommended by the Judicial Conference Committee on Revision of the Judicial Code.
>
> "Section 18 provides that the provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska and related matters shall not be effective until 3 years after the effective date of this act unless the President should sooner proclaim that the United States District Court for Alaska is prepared to assume the functions imposed upon it. *During this interim the United States District Court for the Territory of Alaska shall perform the necessary functions.*" [Emphasis added.][6]

The last sentence of the above quotation indicates that Congress contemplated a smooth changeover of court business, and the quotation as a whole clearly indicates that sections 13-17 were considered to be separate and distinct from section 18. If section 18 is read separately and is given its due nothing but a smooth transfer of cases from the old system to the new can result. To get involved in the highly technical dis-

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[6]H.R.Rep. No. 624, 85th Cong., 2d Sess., June 25, 1957, [To accompany H.R. 7999], 2 U.S.Code Congressional & Administrative News pp. 2933, 2955 (1958).

tinctions between the sections results in frustration of Congressional intent. The use of individual words should not defeat the meaning of a piece of legislation as a whole.[7]

The appellant herein relies heavily on Forsyth v. United States, 9 How. 571, 50 U.S. 571, 13 L.Ed. 262 (1850) which involved a similar factual situation arising when Florida became a state. Notwithstanding their many similarities the Forsyth case and the instant case are distinguishable. In Forsyth Florida became a state on March 3, 1845, thus ending the existence of the Territory of Florida. On November 3, 1845, eight months later, an indictment was returned against Forsyth by a grand jury sworn before the Superior Court of the District of West Florida in the late Territory of Florida. On February 22, 1847, nearly two years after Florida was admitted to the Union, Congress passed "An Act to regulate the Exercise of appellate Jurisdiction of Supreme Court of the United States, in certain Cases, and for other Purposes." 9 Stat. 128 (29th Cong.Sess.II. Ch. 17, 1847). Among other things, the Act provided for the transfer of cases pending in the old territorial courts at the time of Florida's admission to the state courts of Florida or to the new United States District Court. In section 8 of this Act Congress recognized that some judicial business started in the Territorial Court would continue after Florida became a state and that perhaps new business would commence after such

[7]See United States v. Union Pacific R. Co., 353 U.S. 112, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957).

time also. It provided that such cases of a federal nature could be transferred to the new District Court and that such completed cases could be appealed to the United States Supreme Court. However, the Act added the provision:

> "That nothing in this act shall be construed as affirming or disaffirming the jurisdiction, power, or authority of the territorial judges to proceed in, or try, or determine such cases after the third of March, eighteen hundred and forty-five, but the same may be referred to said Supreme Court for its decision in all said cases on such writ of error or appeal."

Relying on its earlier decision in Benner v. Potter, 9 How. 235, 50 U.S. 235, 13 L.Ed. 119 (1850), where the Court held that the jurisdiction of the territorial courts and their judges ceased upon Florida's admission as a state, the Court in Forsyth held that the proceedings wherein an indictment against Forsyth was returned in the old Territorial Court were "coram non judice, and void."[8] Thus, the new United States District Court for Florida couldn't proceed to try the defendant upon a void indictment. The Act was construed as providing for the transfer of all cases pending in the old territorial courts and also of cases completed or commenced after statehood, but in the latter situation the Court was quick to point out that the Act itself carefully guarded "against any construction that might be given to the act tending to affirm jurisdiction."[9]

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[8] 9 How. at 576, 50 U.S. at 576, 13 L.Ed. 262.

[9] Ibid.

The most notable distinction between the instant case and the Forsyth case is the presence of section 18 in this case and the absence of any comparable provision in Forsyth. In the Alaska situation Congress expressly provided for the existence of an interim court to transact judicial business during the interim between the end of the territorial courts and the beginning of the Alaska state and federal courts. In the Florida situation Congress did not utilize its power to create a special interim court. It merely assumed that the courts would continue to operate without giving them authority to do so, and, for some unexplained reason, Congress attempted to avoid jurisdictional problems by passing them on to the Supreme Court. Being more positive with respect to Alaska Congress included section 18 in the Statehood Act, and there would seem to be ample constitutional authority for that provision under Congress' power "to constitute Tribunals inferior to the Supreme Court."[10]

The tenor of the acts relating to the transfer of cases, etc., as Florida and Alaska became states are vastly different. Other than the diverse wording of the statutes themselves, this difference in tenor is perhaps best illustrated by the fact that the Florida statute was not passed until nearly two years after Florida was admitted to statehood while the Alaska

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[10]U.S.Const. art. I, § 8, cl. 9.

In Forsyth the Court expressly failed to reach the question whether Congress had the power to provide for the trial of the defendant upon the so-called void indictment since the Act involved did not profess to confer such authority. Thus the statement of the Court—"We have no doubt they [Congress] possess no such power."—was clearly dictum. (9 How. at 576, 50 U.S. at 576.)

provisions were incorporated into the Statehood Act prior to its admission. The Florida situation is inconsistent with a design to fill a judicial void while the Alaska situation clearly illustrates an attempt to fill an obvious need to have some judicial administration during the foreseen interim period.

Forsyth does not prevent the result contended for herein that the new District Court had power to proceed with matters instituted in the interim court. Though factually analogous to this case in many respects, the law pertaining to the facts of Forsyth was different than that in this case, thus providing the grounds of distinction.

There is nothing in Parker v. McCarrey, 268 F.2d 907 (9th Cir. 1960) which necessarily conflicts with the view taken in this opinion. Parker v. McCarrey did not decide, as the majority say in their opinion, that "the last minute addition of Section 18 of the Enabling Act did not search far enough back through the act to correct inconsistencies."[11] Parker v. McCarrey merely decided that this court had no appellate

[11]In Parker v. McCarrey the defendant, Parker, was indicted in the Territorial Court of Alaska before it became a state. He was threatened with trial in the interim court and having failed in his challenges to that court's jurisdiction he sought a writ of prohibition in this court to stop the proceedings in the interim court. We dismissed the petition for lack of jurisdiction.

In Deere v. United States, 268 F.2d 912 (9th Cir. 1959) and Selid Constr. Co. v. Guarantee Ins. Co., 268 F.2d 913 (9th Cir. 1959) judgments were entered by the interim court although parts of the proceedings took place in the old Territorial Court before Alaska became a state. The appeals were dismissed on the authority of Parker v. McCarrey. See also Kosters v. United States, 268 F.2d 913 (9th Cir. 1959); Emberg v. McCarrey, 268 F.2d 913 (9th Cir. 1959); Jackson v. United States, 270 F.2d 384 (9th Cir. 1959).

jurisdiction over the interim court. The decision was predicated on the proposition that section 12 of the Act (unlike sections 13-17 was immediately effective upon Alaska's admission as a state, and that section 12 so amended the Judicial Code as to deprive this court of jurisdiction. Section 1291 of Title 28, United States Code, is the basic section providing for jurisdiction of the courts of appeals. Prior to Alaska's admission as a state it read:

> "The courts of appeals shall have jurisdiction of appeals from all the final decisions of the district courts of the United States, *the District Court for the Territory of Alaska*, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." [Emphasis added.]

Immediately upon Alaska's admission section 12(e) of the Alaska Statehood Act amended section 1291 by striking out the words "the District Court for the Territory of Alaska."[12] Since this court in Parker v. McCarrey decided that the interim court was neither the District Court for the Territory of Alaska nor the New District Court for the State of Alaska there was no provision in the United States Code for juris-

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[12]Section 12 of the Alaska Statehood Act, 72 Stat. 339 (1958) reads in pertinent part:

"Effective upon the admission of Alaska into the Union—

* * * * * * *

"(e) The words 'the District Court for the Territory of Alaska,' are stricken out wherever they appear in sections 333, 460, 610, 753, 1252, 1291, 1292, and 1346 of title 28, United States Code."

diction over the interim court.[13] To reach the result reached in Parker, however unfortunate such a result may have been, it was not necessary at all to consider the effect of sections 13-18, because section 12 was completely separate and by its own terms immediately effective upon Alaska's admission on January 3, 1959. Thus, the court's language in Parker—"Further, we think that [restricted jurisdiction under the Statehood Act] is the net express effect of Sections 13, 14, 15, 16, 17 and 18, when read together."—[14] was clearly dictum. In no way was it decided that section 18 was not broad enough to provide for the continuation of suits started in the interim court.

Of its holding in this case the majority stated:

> "[W]e appreciate that we must probably let a guilty man go; that we leave unresolved many questions and, perhaps, create new ones."

This is an understatement, for there is no question but that the problems created by the majority opinion are manifold.

The effect of the majority opinion in this case denying the power of the District Court to proceed with cases begun in the interim court is seemingly to question the very foundations of any case connected with the interim court. This effect is not minimized by setting forth a series of questions at the end of the opinion which are intended to describe those things which the majority opinion does not decide. A case such as this one is not decided in a vacuum. Its result

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[13]See note 1 supra.

[14]268 F.2d at 909.

establishes a shaky foundation for future cases in our circuit. The majority opinion undoubtedly will have far reaching effect on any litigation that transpired during the interim whether such litigation was (1) started in the old Territorial Court and completed in the interim court, (2) started and completed in the interim court, (3) started in the Territorial Court, partially completed in the interim court and completed in the new Alaska courts, and (4) started in the interim court and completed in the new courts.[15]

Under the scheme devised by Congress, at worst the transfer of cases from the interim court to the new District Court was a ministerial function of minor importance. At best such transfer was accomplished by operation of law as soon as the new courts were established and the interim court abolished. To fail to give proper efficacy to section 18 by strictly construing section 15 results in a chaotic condition totally abhorrent to the intended purpose of Congress to provide for a smooth transformation of Alaska from a Territory of the United States to a State of the United States.

A thorough review of the record in this case reveals that there is no merit to the appellant's contention that the evidence was insufficient to support his conviction.[16]

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[15]While reindictment of the appellant in the new District Court, as suggested by the majority, would have been a way to avoid the problem in this case the mere availability of that method of avoidance does not support the position of the majority. Reindictment was not required under my view.

[16]On oral argument appellant's counsel waived any argument as to the sufficiency of the evidence establishing appellant's guilt.

It is firmly believed that the more sound and reasonable approach to the problem in this case, and the one with which this court can better live, is incorporated in this dissenting opinion.

I would affirm.

3. **Memorandum of Decision of United States District Court for the District of Alaska, at Fairbanks, the Honorable Raymond E. Plummer, J., dated September 5, 1963 (on Motion to Dismiss Indictment):**

Defendant, through his attorneys, pursuant to Rule 12(b), Federal Rules of Criminal Procedure, has moved to dismiss the indictment on the grounds contained in said motion.

On July 7, 1958, Congress enacted Public Law 85-508, 72 Stat. 339, the Alaska Statehood Act.

On January 3, 1959, pursuant to section 8(c) of the Act, the President of the United States issued Presidential Proclamation No. 3269, 24 F.R. 81, 73 Stat. c. 16, admitting the State of Alaska into the Union at one minute past noon on the 3rd day of January, 1959.

On January 12, 1959, the Airport Road Branch of the Alaska National Bank of Fairbanks was robbed.

On March 11, 1959, an indictment was returned against the defendant Richard A. Woodring in the District Court for the District of Alaska, Fourth Judicial Division, hereinafter referred to as the Interim Court.

On February 20, 1960, by Executive Order No. 10867, 25 F.R. 1584, the President of the United

States, pursuant to Section 18 of the Act, declared the United States District Court for the District of Alaska ready to assume the functions imposed upon it.

During June of 1960 defendant was tried in Cause No. 2252 Criminal in the United States District Court for the District of Alaska.

Defendant was found guilty and on June 24, 1960, a judgment and commitment was entered in the United States District Court for the District of Alaska.

An appeal was taken to the United States Court of Appeals for the Ninth Circuit and on June 7, 1962, that Court filed its opinion and entered its judgment reversing Cause No. 2252 Criminal. Woodring v. United States, 9th Cir. 1962, 304 F.2d 308.

On February 16, 1963, a grand jury authorized and empaneled by the United States District Court for the District of Alaska returned an indictment against defendant containing charges identical to those embodied in the indictment returned by the grand jury empaneled by the Interim Court on March 11, 1959.

Defendant contends that a re-trial under the indictment returned February 16, 1963, would place him in jeopardy contrary to the provisions of the Fifth Amendment to the Constitution of the United States which provides in part: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Jeopardy does not attach unless a defendant establishes that he has been placed upon trial under the following conditions:

(1) Upon a valid indictment or information.

(2) Before a court of competent jurisdiction.

(3) After he has been arraigned.

(4) After he has pleaded to the indictment or information.

(5) When a competent jury has been empaneled and sworn.

Woodring, in the opinion of this Court, fails to meet at least one of these required conditions, namely, the one requiring that he establish that he has heretofore been placed on trial upon a valid indictment.

I find that the indictment returned by the Interim Court and under which Woodring was tried by the United States District Court for the District of Alaska in June of 1960 was invalid insofar as that court was concerned. Congress did not, by the Enabling Act, or otherwise, provide for the transfer of such indictments to the new District Court. In the absence of such a provision any indictment returned by a grand jury that had not been authorized and empaneled by the United States District Court for the District of Alaska would be a nullity.

I make no finding as to the validity of the indictment insofar as the Interim Court may have been concerned or in regard to the jurisdiction of the Interim Court to have tried the defendant prior to February 20, 1960.

It is well established that a person can be tried for a second time for an offense when his prior conviction for the same offense has been set aside by his appeal,

without violation of the prohibition of double jeopardy. *Forman v. U.S.,* 361 U.S. 416, 425; *U.S. v. Ball,* 163 U.S. 663, 671-672.

Defendant contends that the United States District Court for the District of Alaska was without jurisdiction since it was not in existence on January 12, 1959, when the robbery was committed and cites in support thereof Oliver v. U.S., 230 Fed. 971.

Included in the questions not reached by the Circuit Court of Appeals in Woodring v. U. S., supra, was the following: "3. Was there a United States District Court for the District of Alaska in existence without a judge or other staff from January 3, 1959, to the date Judge Walter H. Hodge qualified on February 19, 1960, as the first constitutional United States District Judge for the District of Alaska?".

In *Parker v. McCarrey,* 9th Cir. 1959, 268 F.2d 907, 908, the Circuit Court stated as follows: "It is possible that the 'District Court for the District of Alaska' is in existence now and is just not staffed, or it may be that it comes into existence when the President appoints the federal district judge therefor. That is a question we do not decide."

In *Parker v. McCarrey,* supra, the Circuit Court further stated in part: "It seems clear that the effect of the Enabling Act is to generally restrict this court's jurisdiction on decisions or judgments rendered in Alaska after January 3, 1959, to those coming up from the newly created U. S. District Court for the District of Alaska. * * *."

* * * *

"It would appear that the amendments of Titles 18 and 28 made by section 12 of the Enabling Act would automatically restrict our Alaskan jurisdiction on 'new business' to the United States District Court for the District of Alaska. Further, we think that is the net expressed effect of sections 13, 14, 15, 16, 17 and 18, when read together."

Section 1, Article 3 of the Constitution of the United States expressly and clearly vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish.

Congress, by section 12(b) of the Statehood Act ordained and established the United States District Court for the District of Alaska. Section 12 of the Statehood Act expressly provides that the provisions thereof become effective upon the admission of Alaska into the Union, namely, January 3, 1959, and not at some unknown future date.

Defendant's statement that section 18 of the Statehood Act precluded the United States District Court for the District of Alaska from coming into existence prior to the Presidential Proclamation of February 20, 1960, is without merit. The language of section 18 is as follows, "* * * United States District Court for the District of Alaska, *established* in accordance with the provisions of this Act, is prepared to assume the functions *imposed* upon it." This wording is clearly and expressly stated in the past tense and not in the future tense.

It is significant to note that no further action has been taken by Congress since section 12(b), which became effective on January 3, 1959, was enacted, to ordain and establish the United States District Court for the District of Alaska.

The only action taken subsequent to January 3, 1960, with reference to the United States District Court for the District of Alaska was taken by the Chief Executive, and not by Congress, under Presidential Proclamation 10867, February 24, 1960, 25 F.R. 1584. This Proclamation cannot be construed as an attempt on the part of the President of the United States to usurp the power of Congress by attempting to ordain and establish the United States District Court for the District of Alaska. A reading of Presidential Proclamation 10867 readily establishes the fact that the President of the United States made no attempt to confer judicial power upon the United States District Court for the District of Alaska or to invest it with jurisdiction over federal cases. The clear purpose of the Proclamation was to proclaim that the United States District Court for the District of Alaska, which had been ordained and established by Congress on January 3, 1959, was prepared to assume the functions imposed upon it by Congress on January 3, 1959, and accordingly the jurisdiction of the Interim Court should thereupon terminate.

It is significant to again note that Presidential Proclamation 10867 refers to the United States District Court for the District of Alaska, *established* in accordance with the provisions of the Statehood Act.

Again, use is made of the past tense and not the future tense.

I find that the United States District Court for the District of Alaska was ordained and established by Congress on January 3, 1959, by virtue of section 12(b) of the Statehood Act.

I further find, "the powers remained in abeyance until the office was constitutionally filled. The vesting of the judicial power did not depend upon the appointment of the officer to administer it, as the grant in the Constitution to Congress to ordain and establish inferior courts, and to invest them with the judicial power of the Union, is complete in itself; and they had acted and established the court, and invested it with power, without condition or qualification." See *Benner v. Potter,* 50 U.S. 235, 244.

In the dissenting opinion in *Woodring v. U.S.,* supra, p. 310, Circuit Judge Hamlin states as follows: "When Alaska became the 49th State of the Union on January 3, 1959, there were no state courts ready to perform judicial functions. Furthermore, on that date Alaska ceased to be a territory of the United States, *and the new United States District Court for the State of Alaska was likewise not ready to perform its functions.* Strictly speaking, the former United States District Court for the Territory of Alaska could no longer exist without there being a territory. See Benner v. Potter, 9 How. 235, 50 U.S. 235, 13 L.Ed. 119 (1850); Parker v. McCarrey, 268 F.2d 907 (9th Cir. 1960)."

It would appear from the italicized wording that Judge Hamlin took the position that this Court does that the United States District Court for the District of Alaska came into existence on January 3, 1959, but was not prepared to perform its functions until a later date.

Defendant's motion to dismiss the indictment is denied.

Signed at Fairbanks, Alaska, this 5th day of September, 1963.

Raymond E. Plummer
United States District Judge

4. **Memorandum of Decision and Order of United States District Court for the District of Alaska, the Honorable Raymond E. Plummer, J., dated November 26, 1963 (on Motions for Judgment of Acquittal, for New Trial, and in Arrest of Judgment):**

On February 15, 1963, an indictment in three counts was returned against defendant. The first count charged bank robbery in violation of 18 U.S.C.A. 2113(a). The second count charged that defendant assaulted and put in jeopardy the life of another by use of a dangerous weapon while committing bank robbery, in violation of 18 U.S.C.A. 2113(d). The third count charged defendant with transporting stolen money of the value of $5,000.00 or more in interstate commerce, in violation of 18 U.S.C.A. 2314. On motion of the government, Count II of the indictment was dismissed on August 23, 1963.

The case was tried in September, 1963. At the close of the government's evidence defendant moved for judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. The court reserved its decision. Defendant renewed his motion for judgment of acquittal at the close of all the evidence. The court again reserved its decision.

On September 17, 1963, the jury returned its verdict finding defendant guilty of the crimes charged in Count I and III of the indictment. On that date the time in which to file a motion for new trial or related motions was extended by the court to October 10, 1963. On October 10, 1963, defendant filed motions for (1) judgment of acquittal, (2) for a new trial, and (3) in arrest of judgment.

(1) *Judgment of Acquittal.*

In considering this motion the evidence must be viewed in the light most favorable to the government, including the reasonable inferences to be drawn therefrom. *Cape v. United States,* 283 F.2d 430, 433 (9th Cir. 1960); *Schino v. United States,* 209 F.2d 67, 72 (9th Cir. 1953), rehearing denied 1954, certiorari denied 1954, 347 U.S. 937, 74 S.Ct. 627, 98 L.Ed. 1087.

In *Remmer v. United States,* 205 F.2d 277, 287-288 (9th Cir. 1952), the court stated as follows:

> "It is true, as appellant contends, that proof of increased net worth is only circumstantial evidence of taxable income. The test to be applied on motion for judgment of acquittal in such a case, however, is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but that of guilt, but rather whether *as a matter of law* reasonable minds, as triers of the fact, *must* be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. Stoppelli v. United States, 9 Cir., 1950, 183 F.2d 391, certiorari denied 340 U.S. 864, 71 S.Ct. 88, 95 L.Ed. 631. If reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact and must be submitted to the jury. Curley v. United States, 1947, 81 U.S.App. D.C. 389, 160 F.2d 229, certiorari denied 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850; Stoppelli v. United States, supra."

See also *Schino v. United States,* supra; *Cape v. United States,* supra; *Bolen v. United States,* 303 F.2d 870, 874 (9th Cir. 1962).

In *Schino v. United States,* supra, the court stated:

> "The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as with guilt, has been laid to rest in this circuit by the Remmer case, at least where, as here, the question arises on a motion for judgment of acquittal."

It is my conclusion from a careful examination of all the evidence that reasonable minds could find that the evidence excludes every reasonable hypothesis but that of guilt as to Count I of the indictment but that reasonable minds could not find that the evidence excludes every reasonable hypothesis but that of guilt as to Count III of the indictment. In my opinion there is insufficient evidence from which the jury could have found beyond a reasonable doubt that the value of the money allegedly transported in interstate commerce from Fairbanks, Alaska, to Los Angeles, California, was of a value of $5,000.00 or more.

(2) *Motion for New Trial.*

Defendant's motion for new trial is based upon the following grounds:

1. The insufficiency of the evidence submitted to the jury.

2. The court's refusal to grant the judgment of acquittal at the close of all the evidence.

3. One of the jurors reading of the previous trial and that Woodring was convicted and reversed on technical grounds.

4. That the question asked of Mr. Small as to what Maxine Edwards had said at the airport to Richard Woodring in Mr. Small's presence was not admitted in evidence.

5. The instruction of the judge as to the previous trial was improper. There should have been no instruction whatsoever.

On a motion for new trial the power of the court is much broader than on a motion for judgment of acquittal. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Barron v. Holtzoff, Federal Practice & Procedure, Vol. 4, § 2281, p. 281.

The court has applied this standard in considering the evidence in this case and has concluded that there is sufficient evidence to sustain defendant's conviction under Count I of the indictment but that the evidence is insufficient to sustain defendant's conviction under Count III thereof.

At the outset of the trial the court read Counts I and III of the indictment to the entire jury panel, introduced the defendant and counsel for the respective parties, gave a factual explanation of the previous trial, conviction, appeal, reversal and re-indictment, and specifically told the jurors that the previous proceedings had no bearing whatsoever on the present case. The court at that time also advised the entire

jury panel of the rule of reasonable doubt and the presumption of innocence.

The court's sole purpose in advising the jurors of the previous proceedings was to afford counsel for the respective parties on voir dire examination, an opportunity to elicit from the prospective jurors answers under oath as to whether or not said jurors would or would not consider the previous proceedings in arriving at a verdict in the case on trial. It is the court's recollection that counsel for defendant availed himself of this opportunity and on voir dire examination questioned some of the prospective jurors as to whether the previous proceedings would have any effect on their arriving at a fair and impartial verdict on the trial of this case. It is also the court's recollection that counsel for defendant on several occasions during the course of the trial asked witnesses questions pertaining to their testimony on the previous trial. It is the court's further recollection that on at least several occasions counsel for defendant used the transcript of testimony from the previous trial in impeaching or attempting to impeach government witnesses.

When the court gave its initial explanation of the previous proceedings defendant and his counsel sat by without objection or comment. If, in fact, defendant felt that the court's explanation was prejudicial he should at that point, have moved for a mistrial. Apparently, defendant did not consider the explanation to be prejudicial and on page 10 of defendant's

Rebuttal Memorandum filed on November 13, 1963, the following statement appears:

> "It is submitted that the trial court conducted itself properly in all respects in the protection of the rights of the Defendant to insure him a fair and impartial trial. To this extent the Court in order to acquaint the trier of facts with the prior proceedings, that is previous conviction, appeal, reversal and subsequent reindictment informed the trier of facts of this upon its own initiative."

On September 13, 1963, the following news item appeared in the Fairbanks Daily News-Miner, the only newspaper published daily in the City of Fairbanks, Alaska:

> "BANK ROBBERY JURY TRIAL UNDER WAY IN DISTRICT COURT
>
> "State's witnesses in the jury trial of Richard A. Woodring, 41, charged with robbing a bank in Fairbanks on Jan. 12, 1959, will continue to take the stand today in U. S. District Court beginning at 10 a.m.
>
> "The retrial of Woodring, previously who had been found guilty and then acquitted, began Monday and so far has centered on testimony of witnesses for the state, many of whom have been brought to Fairbanks from the smaller states for the trial.
>
> "Witnesses for the defense are expected to begin taking the stand about noon today.
>
> "Woodring has been making his home in Oklahoma when he was re-indicted. He is also charged with interstate transportation of stolen property.

"The state prosecutor is James Clouse of the U. S. Attorney's Office, Anchorage, while Eugene Miller of Fairbanks is attorney for the defendant.

"Woodring's plea is mute, pleading neither innocent nor guilty."

On Saturday, September 14, 1963, one of the jurors contacted the judge's secretary and inquired about the news item. The judge did not speak with the juror but this fact was called to his attention by his secretary and upon reconvening court the judge made the following statement to the jurors:

"Before recess or adjourning one of the jurors was bothered about the item in last night's newspaper about the previous trial and this trial, and I thought I had made that very clear that that trial has nothing whatsoever to do with the present case. It's no concern of the jury.

"It has been mentioned from time to time the Court will instruct you in writing when the other instructions are given as to the fact that you are not to consider it.

"But the facts are that the case was previously tried by this court with Judge Hodge sitting on an indictment returned by the so-called interim court. He was convicted, he appealed. He was convicted on Counts 1 and 3, he appealed, I think it was in June of 1962. The Ninth Circuit Court reversed, saying that the Enabling Act, the Statehood Act, contained no provision whereby an indictment could be transferred from the Interim Court to this court, which is a Constitutional Court, a United States District Court. So the effect of the reversal on appeal was to erase all

proceedings, which were previously had, and likewise the jury are not to consider it in any light whatsoever insofar as this trial is concerned, and you will be instructed in writing as to that subject."

When this admonition was given by the court to the jury defendant and his counsel sat by without objection or comment. No motion for a mistrial was made so apparently defendant was completely satisfied with the admonition as given by the court.

After the arguments were completed the court instructed the jury and thereafter gave counsel for the parties an opportunity to object to the instructions out of the hearing of the jury. At that time Mr. Miller stated in substance as follows, Your Honor, I have two in addition. I have an objection to any instruction being given about any previous conviction or previous trial of this defendant.

The court stated in substance as follows, the objections are noted—Instruction 3-A refers to the previous proceedings, was submitted jointly by Mr. Phillips and Mr.—let the record show that it was submitted jointly by Mr. Phillips and Mr. Clouse.

Defendant's objection to Instruction 3-A does not comply with Rule 30, Federal Rules of Criminal Procedure, which requires that the party must state distinctly the matter to which he objects and the grounds of his objection. Instruction 3-A is a fair and factual statement and was given to protect the rights of the defendant and to insure him a fair and impartial trial.

The court's instructions covered the rule of proof beyond a reasonable doubt and the presumption of innocence. The jurors were specifically instructed that, "The evidence in a criminal case consists of the sworn testimony of all the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated to by the parties, and all applicable inferences and presumptions referred to in these instructions."

And that, "You have no right to take into consideration any facts or information concerning any matters not introduced or before you in evidence in this case, and you have no right to consider or discuss any such matters in your deliberations upon the merits of this case. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case."

When considered in their entirety the court's instructions fairly and accurately stated the law applicable to the case. There is no indication that the court's instructions were not followed by the jury.

A jury is presumed to have understood and followed the court's instructions and to have given proper weight to the testimony. *Delli Paoli v. United States,* 232 U.S. 243; *Dean v. United States,* 51 F.2d 481, 484, 485 (9th Cir. 1931); *Cavness v. United States,* 187 F.2d 719, 722-723 (9th Cir. 1951), *Donaldsen v. United States,* 248 F.2d 364, 367 (9th Cir. 1957); *Suhav v. United States,* 95 F.2d 890 (10th Cir. 1938); *United States v. Sorrey,* 151 F.2d 899, 903

(7th Cir. 1945); *United States v. Kline,* 221 F.Supp. 776, 787 (D.C. Minn. 1963).

(3) *Arrest of Judgment.*

By this motion defendant reasserts his continuing objection that this court is without jurisdiction of the offenses charged.

This question was previously raised by defendant's motion to dismiss the indictment. By reference the court incorporates its Memorandum of Decision filed on September 5, 1963, denying defendant's motion to dismiss.

In *Parker v. McCarrey,* 9th Cir. June 16, 1959, 268 F.2d 907, the court held that section 12 of the Statehood Act (unlike sections 13-17) was immediately effective upon Alaska's admission as a state and that section 12(e) so amended the Judicial Code so as to deprive the Circuit Court of Appeals of jurisdiction. The logic and reasoning of the Circuit Court of Appeals with reference to section 12(e) of the Act is equally applicable to section 12(b) and it would logically follow that section 12(b) would likewise become immediately effective upon the admission of Alaska as a state.

Accordingly, on January 3, 1959, section 12(b) of the Statehood Act provided as follows:

> "Sec. 12. Effective upon the admission of Alaska into the Union—
>
> * * * *
>
> "(b) Title 28, United States Code, is amended by inserting immediately after section 81 thereof

a new section, to be designated as section 81 A, and to read as follows: '§ 81 A. Alaska

" 'Alaska constitutes one judicial district.

" 'Court shall be held at Anchorage, Fairbanks, Juneau, and Nome.' "

The legislative history of the Alaska Statehood Act, 1958 U. S. Code Congressional & Administrative News, pages 2933-3008, reflects in part as follows:

Page 2935—"13. Establishes the United States District Court of Alaska as a court of the United States with full judicial powers and also makes necessary judiciary provision of the United States Code applicable to the State of Alaska (secs. 12, 13, 14, 15, 16, and 17)."

Page 2955—"Section 12 establishes a United States District Court and makes a number of necessary technical amendments to Titles 18 and 28 of the United States Code.

"Sections 13 through 17 provide for a continuation of suits, the succession of courts, the savings of the rights of litigants in the courts. These five sections are recommended by the Judicial Conference Committee on Revision of the Judicial Code.

"Section 18 provides that the provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska and related matters shall not be effective until three years after the effective date of this Act unless the President should sooner proclaim that the United States District Court for Alaska is prepared to assume the func-

tions imposed upon it. During this interim the United States District Court for the Territory of Alaska shall perform the necessary functions."

Page 2963—". . . . The bill would provide for the establishment, pursuant to Article III, section 1, of the Constitution, of a United States District Court for the District of Alaska and for the appointment pursuant to the provisions of Title 28, United States Code of 1 District Judge, 1 United States Attorney, and other officers for the newly created federal court. Unlike the existing court, the newly created court would not function in a dual capacity but would be limited to causes of such a nature as to be within the jurisdiction of a federal court.

"A new federal court coming into existence upon the admission of Alaska to statehood it would appear that the existing court, its four judges, other personnel of the court, the district attorneys and the United States marshals no longer would function in a federal capacity. Since it appears likely that some time would elapse before the newly created court is organized and ready to function, it would seem desirable that some provision be made for the interim function of a federal judicial system in Alaska."

Sections 13, 14, 15, 16 and 17 of the Statehood Act clearly pertain to matters unrelated to the establishment of the United States District Court for the District of Alaska. Section 18 of the Act merely provides that the provisions of sections 13, 14, 15, 16 and 17 shall not be effective until three years after the effective date of the Act, unless the President, by execu-

tive order, sooner proclaimed that the United States District Court for the District of Alaska, established by section 12(b) of the Act, was prepared to assume the functions imposed upon it.

The nomination of Walter H. Hodge as United States District Judge for the District of Alaska was confirmed by the Senate of the United States on February 19, 1960. The records of this court reflect that his oaths of office pursuant to 5 U.S.C.A. §§ 21 (a) and 21(b), 5 U.S.C.A. § 16, and 28 U.S.C.A. § 453 were taken and filed on February 19, 1960.

On the following day, by Executive Order 10,867, 25 F.R. 1584, the President of the United States proclaimed, pursuant to section 18 of the Act, that he had appointed The Honorable Walter *N.* Hodge to be United States District Judge for the District of Alaska; that Judge Hodge had appointed an acting United States attorney and acting United States marshal and other court officers; that the United States District Court for the District of Alaska was prepared to assume the functions imposed upon it; and that the jurisdiction of the District Court for the Territory of Alaska and the tenure of the judges, the United States attorneys, marshals, and other officers of that court were terminated.

Executive Order 10,867 is unrelated to the establishment of the United States District Court for the District of Alaska by section 12(b) of the Act on January 3, 1959. At most it was merely a recitation by the President that the United States District Court for the District of Alaska, established by sec-

tion 12(b) of the Act, had been staffed and that it was prepared to assume the functions imposed upon it by section 12(b) of the Act on January 3, 1959.

It would be difficult to find language more appropriate to the present case than the following statement of the Supreme Court in *Benner v. Porter,* 9 How. 235, 244:

> "Another answer, also, to the ground taken, is, that Congress on the same day on which the act passed admitting Florida as a State, organized the State into a judicial district, to be called the District of Florida, and ordained and established a District Court within the same, and conferred upon it the judicial powers belonging to the general government within the State. The act also provided for the appointment of a judge, together with other officers necessary to its complete and efficient organization. The laws of the United States, not locally inapplicable, were, also, extended over the State. Act of Congress, March 3, 1845. (5 Stat. at L., 788.)
>
> "It is true, the judge was not appointed to fill the office until the 8th of July, 1946, a year and five months afterwards; but the court was established, and invested with jurisdiction over the Federal cases. The powers remained in abeyance until the office was constitutionally filled. The vesting of the judicial power did not depend upon the appointment of the officer to administer it, as the grant in the constitution to Congress to ordain and establish inferior courts, and to invest them with the judicial power of the Union, is complete in itself; and they had acted and established the court, and invested it with the power, without condition or qualification."

It is Ordered as follows:

(1) Defendant's motion for judgment of acquittal is granted as to Count III and denied as to Count I of the indictment.

(2) Defendant's motion for new trial is denied.

(3) Defendant's motion in arrest of judgment is denied.

Dated at Fairbanks, Alaska, this 26th day of November, 1963.

Raymond E. Plummer,
United States District Judge.